

**LEGAL ASPECTS OF SOVEREIGNTY OVER NATURAL RESOURCES**  
**RELATED TO AFRICAN STATES**

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List of Abbreviations

A.D.B.	African Development Banks
A.C.	African Confidential
A.R.B.	African Research Bulletin
A.G.I.P.	Azienda General Italian Petroli
A.P.I.	American Petroleum Institute
A.J.I.L.	American Journal of International Law
B.P.P.	British Parliamentary Papers
B.Y.I.L.	British Yearbook of International Law
B.T.E.	British Tax Encyclopaedia
C.I.P.E.C.	Conseil Intergouvernemental des Pays Exportateurs de Cuivre
C.L.P.	Current Legal Problems
C.P.C.M.	Maghreb Permanent Consultative Council
D.C.	Developing Countries
E.C.A.	Economic Commission for Africa
E.A.C.	East African Community
E.C.A.F.E.	Economic Commission for Asia and Far East
E.C.S.C.	European Coal and Steel Community
E.E.C.	European Economic Community
E.S.C.	Economic and Social Council
E.T.S.	European Treaty Series
Euratom	European Atomic Energy Community
G.A.	General Assembly
G.A.T.T.	General Agreement on Tariffs and Trade
G.S.P.	Grotius Society Papers and Transactions
I.C.J.	International Court of Justice
I.M.F.	International Monetary Fund
I.B.R.D.	International Bank for Reconstruction and Development



I.L.C.	International Law Commission
I.L.	International Lawyer
I.L.M.	International Legal Materials
I.L.A.	International Law Association
I.L.R.	International Law Reports
I.L.S.I.D.	International Centre for Settlement of Investment Disputes
I.C.L.Q.	International and Comparative Law Quarterly
I.C.Q.	International Law Quarterly
I.B.A.	International Bauxite Association
I.A.P.P.	International Association of Phosphate Producers
I.I.O.A.	International Iron Ore Association
I.A.M.P.	International Association of Mercury Producers
I.J.I.L.	Indian Journal of International Law
I.T.T.	International Telephone and Telegraphs
J.M.A.S.	Journal of Modern African Studies
J.W.T.L.	Journal of World Trade Law
J.V.	Joint Venture
J.B.L.	Journal of Business Law
L.M.G.	London Metal Exchange
L.N.O.J.	League of Nations Official Journal
L.N.T.S.	League of Nations Treaty Series
M.T.N.	Mineral Trade Notes
O.C.A.M.	Afro-Malagasy-Mauritius Custom Organisation
O.A.U.	Organisation of African Unity
O.E.E.C.	Organisation for European Economic Corporation
Off. Rec.	Official Record
Off. Sess.	Official Session
O.P.E.C.	Organisation of Petroleum Exporting Countries

viii.

P.S.Q.	Political Science Quarterly
P.C.I.J.	Permanent Court of International Justice
S.C.	Security Council
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series
U.N.I.D.O.	United Nations Industrial Organisation
U.N.C.T.A.D.	United Nations Conference on Trade and Development
U.D.E.A.C.	Central African Customs and Economic Union
U.N.Y.B.	United Nations Year Book
U.N.R.I.A.A.	United Nations Reports of International Arbitral Awards
W.A.E.C.	West African Economic Community
Y.B.I.A.	Yearbook of International Affairs
Y.B.I.L.	Yearbook of International Law
Y.B.W.A.	Yearbook of World Affairs

## INTRODUCTION

Natural Resources utilized and put to the service of man are fundamental to economic and social development. In order to grasp the full spectrum of options in the field of natural resources it is of particular importance to formulate an integrated approach, both short and long term, to their development and utilization as there are many interdependent problems in their management and control.

There does not seem to be any single legal definition of Natural Resources. However it may be said in simple terms, that natural resources are a gift of nature, sometimes in the form of raw materials, which skilled hands and discerning minds can turn to the improvement of the human lot. In the Havana Charter,<sup>1</sup> natural resources were defined as;

"primary commodity, any product of farm or fisheries which can undergo such processing as is customarily required to prepare them for marketing in substantial volume in international trade".

The above definition conveys the idea that natural resources as a primary commodity can be divided into two categories:<sup>2</sup>

- (a) Renewable i.e. agricultural resources;
- (b) Non-renewable i.e. mineral resources;

In this study attention is directed only to non-renewable natural resources.

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1. Havana Charter Art. 56 - See Parliamentary Paper XVIII, 1947-48, p.56.
  2. A classification of natural resources was made country by country in a League of Nations study, Doc. II, 1928, p. 38 (Financial and Economic Series).



Minerals, as non-renewable natural resources, contrast sharply with renewable resources such as agriculture and sivilculture and they can themselves be sub-divided into two further categories:

(a) Non-recyclable: those which are largely destroyed or converted into a form in which they cannot be recovered. into this category fall petroleum, coal and mineral pigments.

(b) Recyclable: these include those minerals that are capable of being used several times, such as gold, iron, and lead. This is possible because when the article in which recyclable metal has been employed becomes obsolete, it can be sent back to the furnace as scrap and the metal can be reprocessed for reuse. Apart from that, the mining of iron ore or limestone leaves only a hole in the ground. There is no second crop of mineral after the first deposit has been exploited. The significance of this classification is that the characteristics of minerals influence states' legislation and bargaining positions with the companies, and also lead to more stringent controls imposed on foreign citizens exploitation of such resources.

Another peculiarity is that minerals are unevenly distributed among nations, both in volume and variety. No nation is endowed with the full range of minerals. This situation often leads to conflicts between the mineral

exporting and mineral importing countries. In some cases the unequal distribution of minerals necessitates International co-operation and coordination over the use of one particular mineral product.

In Africa, which is the main concern of this study, mineral exploitation has gone through many stages and taken many forms. For example, before the advent of Europeans in the continent, African nations were controlling the minerals in their own system until they lost the control of these resources to the foreign powers that colonized them. These Powers tentatively assumed effective control over natural resources. When African nations were advanced to the status of statehood they strove to regain the lost right to control natural resources in various ways - modifying the previous colonial laws regarding exploitation of mineral resources, renegotiating any left-over contracts on their own terms, and in some cases nationalizing some of the concessions, though leaving the previous investors with their acquired rights.

Presently mineral resource exploitation in Africa is subjected to the acquisition of rights from state authorities, usually in the form of concessions, or leases, preceded in some cases by licences or permits. Although in many cases they are required for operation by nationals to the same extent as for operation by foreign citizens states grant



permits, licences, leases and concessions as an important means of controlling the acquisition of rights by foreign citizens and their extent, in their natural resources.

Laws which in effect limit rights and prescribe the conditions which may be negotiated with private persons by appropriate governmental authority, sometimes require legislative approval for particular grants and indicate ways in which legislatures of various countries consider that the sovereign rights and national interests in natural resources may be best preserved. Typically legislation limits the governmental authorities' discretion only with respect to maximum rights, and minimum obligations, and allows wide latitude for negotiation of terms favourable to states.

It can be seen that sovereignty is a prerequisite for effective control of natural resources. The more dependent a country is, the less opportunity it has to exercise control over natural resources. In such cases independence conveys the right of effective control and is in itself a manifestation of sovereignty. However, this study is concerned mainly with examining the system of mineral control prevailing in Africa, prior to the advent of foreign companies, then during the colonial regime, and lastly after the nations



attained political independence. The variety of machinery and instruments African states employed to control their natural resources domestically and internationally will be examined.

The method used in this research is purely inductive. In other words available materials, both original and primary, state practice, and judicial decisions were relied on. However, it must be added that because of the wide scope of the subject, and the secrecy which states and companies attach to their agreements and transactions, the materials used in this work may not be entirely exhaustive; it is hoped however, that this study has opened the way for future research on similar controversial issues of international importance, as, in a continent like Africa, much more about its approach to international economic law still needs to be known.

## CHAPTER I

### HISTORICAL DEVELOPMENT

#### INTRODUCTION

Pre colonial African life was sustained by the exploitation of natural resources. Thus the most essential foodstuffs were obtained by exploiting the natural environment - hunting, gathering of vegetables, and raw materials by simple mining of mineral resources. With the food producing economy trade also became far more important, for many requirements of more complex economy and material culture had to be met from other sources available locally.

While such items as skins and grains were a significant part of inter-village trade,<sup>1</sup> the exploitation of basic mineral raw materials, for example copper, and salt, was responsible above all for the development of complex inter-regional bartering networks, which were based on a comparatively steady but informally structured demand for raw materials. This chapter will therefore examine the systems of and legal controls over exploitation of natural resources prevailing in Africa prior to the colonial period, and then within the colonial period itself, with a view to finding the general attitude of Africa towards natural resources, and the impact, and after effect of foreign investment.

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1. M.P. Miracle Plateau Tonga entrepreneurs in historical inter-regional trade Rhod. Livingstone Journal Vol. XXVI 1959 pp. 34-50.

The first phase deals with the African approach to the working of natural resources, and all the mechanisms with which the operation was carried out. The second phase is concerned with the genesis of foreign involvement in the natural resources industry of the African continent; which started with the early European companies. Finally the third phase examines the colonial regime and the various laws relating to exploitation of natural resources.

# I. The African Phase

## A. The Concept of Ownership of Natural Resources

The earliest concept of natural resources in Africa was indistinguishable from land ownership. The land belonged to the community, likewise hunting grounds, forests, and their products, wells, springs, salt lakes and flint deposits were held by the group in communal ownership. The above facts are supported by the general exposition of Viscount Haldane in the case of Amodu Tijani v. Secretary<sup>2</sup> Southern Nigeria. In delivering the judgement of the Privy Council,<sup>3</sup> he said:-

'The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the Community, the village, or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief of Headman of the Community or village or head of the

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2. [1921] 2 A.C. 399.

3. Ibid at p. 40. See also Dr. Elias Nigeria Land Law 1971 p. 72.



family, has charge of the land and in a loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build upon, goes to him for it. But the land so given remains the property of the community or family. He cannot make any important disposition of the land without consulting the Elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of the coast...'

How did the communal ownership operate within African nation in the pre colonial period? Natural resources were held in communal ownership in the sense that there were no individuals who could claim ownership of them; at least in the sense that ownership is used in Western legal systems. The peculiarity of the African concept of ownership of natural resources was its complexity, in that the right of individuals and those of group-members of the nation (i.e. collections of various tribes) co-existed within the same social context. Thus when communal ownership of natural resources was spoken of, it implied the resources in which the individual members of the nation held recognised rights, and those over which no claim or right had ever been made or asserted whether by groups or individuals.<sup>4</sup>

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4. In most African countries, some forests land water are dedicated to gods, Those resources also come under communal ownership.

The communal ownership of natural resources was limited in two ways:-

(a) When an individual had got a place allocated to him by the Chief, he became the owner of such products as he won therefrom by his own labour.

(b) The Chiefs or Headman had no right whatsoever of continuous control or detailed supervision over the resources which had been allocated to a group or an individual except where there existed an abuse of right.

The above situation reveals that in pre colonial Africa, there was no concept comparable to the English/Western idea of a fee simple absolute in possession of natural resources.<sup>5</sup>

#### B. The Right Vested in Chiefs

The early research identified the African continent with Chieftaincy or a monarchical type of society. This society was characterised by the existence of a centralized authority, administrative machinery and judicial system, all three of which constitute the criteria by which any human society can be regarded as possessing a government. In the type of society that flourished in Africa, the Chiefs represented the administrative and judicial powers. The right to control natural resources was vested in them. In other words the Chiefs were charged

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5. Under the English law, the Crown is the only true owner of land and its resources until individual is granted the right of exploitation - Cheshire The Modern Law of Real Property 1944 pp. 116-117.

with the responsibility of administration of the allocation of sites to the nation. They controlled the resources as caretakers or trustees. In either case, the Chiefs were the representatives of the nation, through whom every transaction related to natural resources passed.<sup>6</sup>

The principle of the representative character of the Chiefs with regard to natural resources was almost universal in Africa.<sup>7</sup> There were two aspects to the rights vested in the Chiefs:- the negative and the positive. The former consisted of the Chiefs legal incapacity to treat the resources as his personal property. This accounted for the existence of councils of Elders and Notables, who acted as a sort of cabinet and ensured that the Chiefs' dealings did not exceed the accepted proprieties.<sup>8</sup>

The latter concerned the Chiefs as recognised representatives of the nation, who could act as middle men between their people and third parties in any issue involving the exploitation of natural resources. It is not surprising that in certain areas

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6. The early agreement which is dealt with in the 2nd phase of this study was concluded between the African Chiefs and European Companies. See footnotes nos. 34, 35.

7. Dr. Elias op. cit. p. 84.

8. C.O. 879/35 No. 65. In almost all the agreements concluded between the Chiefs and foreign companies, there were witnesses to see that the Chiefs had not exceeded their right. This agreement can be seen in Microfilm in the Public Records Office, London.



the position of a Chief or King as a caretaker took another form; in the sense that real estate was vested in the absolute ruler; who owned the resources as part of his patrimony or divine right. Such an idea of ownership of natural resources culminated at an early stage in the rights of the Pharoos of Egypt.<sup>9</sup>

C. Control exercised by the Chiefs

The Chiefs wielded political powers and influence, and so incurred corresponding responsibility. The control exercised by the Chiefs was evident in the allocation of sites and the organising of the native working of natural resources. Dr. Gertzel, who studied the activities of British merchants and their relations with African Chiefs observes that:

"The two largest of the Chiefs on the coast, Nna-na of Wari and King Jaja of Opobo had commercial organisation, which stretched over considerable areas of the country and which employed several thousand people in various capacities - canoe men, traders, labourers, warriors and local buying agents. No European agents, even if prepared to employ Kru labour on a vast scale, could have done so".<sup>10</sup>

The control of natural resources by the Chiefs was also manifested in their persistent efforts to resist encroachment by unauthorised persons or companies by exploiting natural resources without prior agreement.<sup>11</sup> The Chiefs succeeded in doing so by limiting the operation of the companies to specific

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9. Flawn, Mineral Resources 1966 p. 150.

10. Journal of African History III 2 1962 pp. 361-366 - Relations between Africans and European Traders in Niger Delta, see also Dr. Dike Trade and Politics in Niger Delta 1956.

11. F.O. 84/148 No. 14.

areas. The first such case arose in Delta. It involved the West African Company (Manchester) and others.<sup>12</sup>

In fact King Jaja drove Messers Alexandre Muller Brother and Co. Ltd. (Glasgow) from his territory because they wanted to exploit the resources without asking permission or obtaining an agreement to do so from the Chiefs. In his explanation to Consul Herwett King Jaja maintained that:

"This country is mine. I do not want any white traders or companies here. If anybody wants to trade with me, he is free to do so at port of Opobo".<sup>13</sup>

Restrictions and controls imposed by the African Chiefs were much felt by the early European companies. The consular dispatches for the years 1880-1884 clearly demonstrated that the British companies viewed some of the African Chiefs controls of natural resources with alarm, and were more concerned with the task of eliminating them than stemming possible French and German intervention.<sup>14</sup>

A study of some of the requests for annexation prior to 1884 would show that foreign companies felt that African natural resources were being controlled through the Chiefs.

In February 1882 John Holt appealed to the Foreign Office to protect Mr. Watts, who he claimed was the victim of African Chiefs. He suggested that the annexation of the Coast from

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12. The Companies involved in exploitation of natural resources of the African Continent at early stage were Messrs. Alexandre Muller and Co. Ltd., the Central African Company based in London, V. Regis Anne Naselle based in France, and James Pinnock based in Liverpool.

13. F.O. 84/1630 Opobo Town from King Jaja to Granville 7th June 1883.

14. F.O. 84/1617.



Lagos to the Cameroons was the only safeguard for British companies.<sup>15</sup> In June 1883 Consul Hawett, writing to Lord Granville, stated that his reason for urging the annexation of the Cameroons was to enable the British companies to obtain the influence in the interior then exercised by the Chiefs - the sole administrators of natural resources. He added that the annexation would enable the companies to push into the interior and get rid of the services of the Chiefs as middle men.<sup>16</sup>

Were the African nations exploiting mineral resources in the pre colonial period? It has often been thought that before the advent of the European companies, Africans were only engaged in subsistence farming - gathering wild fruits, and vegetables etc.<sup>17</sup> Long before the Christian era, in the seventh Century B.C., the native working of gold in Ethiopia was known to the seafaring races on the shores of the Indian Ocean.<sup>18</sup> When Matabeleland was invaded during the Matabele war, it was discovered that extraction of gold by the natives had been going on since before 1890, and the belief that rich deposits would be found in old diggings acted as a stimulus to the early pioneers of South Africa.<sup>19</sup> In Northern Rhodesia,

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15. F.O. 84/1630 from Holt to Granville 16th February 1882.

16. F.O. 84/1630 from Holt to Granville 16th February 1882.

17. Pre-Colonial African Trade, ed. by Richard Gray and Birmingham 1970 p.1.

18. Nicholas De Kun Mineral Resources of Africa 1965 p. 31.

19. Roger Summer Ancient Mining in Rhodesia, National Museum Memoir No. 3 1969 p.5.



there were ancient mining sites which served as a guideline to the prospecting team sent from Bulwaŋgo in 1899, which discovered the Kinshasi mine and located larger copper deposits in Katanga.<sup>20</sup> Workings of considerable antiquity and undoubted pre-European date were seen and described by Carl Munch and Hartely - two early European geologists who visited Rhodesia. These workings undoubtedly gave credence to the legends of the Empire of Monomotapa in Central Africa as did copper, gold, and iron workings, which were found in the tribal land of the native inhabitants.<sup>21</sup>

On the West Coast of Africa, the indigenous inhabitants had extracted gold and worked tin for a long but unknown period.<sup>22</sup> The exploitation of the existing West African gold and diamond field followed upon the discovery that diamonds in Tarkwa<sup>23</sup> and gold in Guinea were worked by the natives. The same was true of tin deposits in Nigeria.<sup>24</sup> From the above facts, one can conclude that the natives were exploiting mineral resources in pre colonial period.

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20. National Archives of Rhodesia Public Record Office  
M3/7/6/3; M9/4/1/ ; M13/4/1/1; RH/9/1/5; M4/7/1;  
M9/4/1; MW/2/1/1. These files contain information on old  
mining claims, see also Lord Hailey An African Survey  
1938 p. 1485.
  21. Ecology and Economic Development in Tropical Africa  
Research Series No. 9 1965.
  22. Archelogia Zambiana 111 1963 p. 34.
  23. Roger Summer op. cit. p. 16.
  24. Geological Survey of Nigeria Occasional Paper No. 9 1951.

The importance attached to natural resources for the well-being of the African nation, necessitated rigid control. In the first place, they formed the bulk of food stuffs for the people. They were the medium of exchange in what was essentially a barter economy.<sup>25</sup> Copper, for example, was used for a long time as a medium of exchange. It also had social and decorative values.<sup>26</sup>

For these reasons the resources were controlled by the Chiefs. A point worth emphasising is that most of the non renewable resources were used as the medium of exchange. Thus the purchasing power of the nation depended not only on the availability of those resources, but also on their efficient management; hence the stringent control through the Chiefs. Evidently control of natural resources through the representatives of the nation, was necessary not only for monetary security, but also to maintain steady barter trade with the

25. See especially the extensive documentation provided by Lans Sundstrom, *The Trade of Guinea* 1965 pp. 74-5, 80, 86-93. See also Paul Einzig *Primitive Money in its Ethnological Historical and Economic Aspects* 1966 pp. 110-131, 141-2, 151-52. See also AFC Ryder *Benin and European 1485-1897* 1969 pp. 95-6, H.M. Krik - Green *The Major Currencies in Nigerian History* *Journal of Historical Society of Nigeria* 11, 1960 pp. 132-50, J. Barbot, *A Description of the Coasts of North and South Guinea* in Awnsham Churchill, *A collection of Voyages and Travels* 6 Vols. 1732 v. 117 pp. 382-465.

26. Africans used copper as objects of personal adornment and emblems of status and Kingship. In 1554 Richard Eden wrote of the Women of Mina in Gold Coast now (Ghana)

"And albeit they ape in maner all naked, yet are many of them especially women laden with collars bracelets hoppers and chains either of gold, copper or ivory ... Some wear also on their leggs great shackles of bright copper which they think no lessee comely".

See Eugenia Herbert - *The Use of Copper in Pre-colonial West Africa* - *Journal of African History* XIV 2 1973 p. 182. In some societies the exchange of copper rings and bracelets was restricted to bride price. *Ibid* p. 181.



outside world. One may perhaps better appreciate the line of action taken by the African nation to control foreign exploitation of natural resources, if one just thinks in terms of monetary sovereignty of modern states, by which each country controls and protects its currency from counterfeiting, or acts against any economic ventures that could inflict danger to its gold reserve and its balance of payments.

Finally it must be added that the control of natural resources through the Chiefs indicated the consciousness of the people of their right over their own natural resources. Moreover the exploitation of these resources by the natives was not only significant for its historic interest, but it also afforded a guideline for early European mineral prospectors. The above account justifies the conclusion that the African Chiefs and nations not only exercised effective control over their natural resources, but looked upon them as their currency and above all as their natural heritage and means of livelihood worthy of protection, and efficient management.

## II. Foreign Companies Phase

### A. Forms of Agreement between the African Chiefs and the European Companies

The first economic contact between the African nations and Metropolitan countries<sup>27</sup> was promoted by the chartered companies - trade association with quasi governmental functions -

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27. C.O. 2 No. 1 Commerce with the interior also in Public Record Office London.



representing the major industrialised countries of Europe - Britain, Belgium, France, and Germany. The companies were interested in acquisition of raw materials in Africa. At that time the need for raw materials in Europe was intensified by the industrial revolution.

The first phase of the transactions between the African rulers and foreign companies were peacefully conducted by the conclusion of agreements. The conclusion of agreements with the Chiefs or Kings was the first step the companies took to respect the right of African nations over their natural resources. The agreement concluded between the Chiefs and the foreign companies were exclusively of a commercial nature. The Sultan of Sokoto, King of the Musslimans of the Sudan, concluded such agreements with a National African Company.<sup>28</sup> Similar agreements were concluded between Ossyeba Chiefs and French Companies;<sup>29</sup> and the Sultan of Zanzibar and an East African German Association.<sup>30</sup>

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28. The main text of the agreement concluded between the Sultan of Sokoto and the National African Company is as follows:-

Art. 1 For the mutual advantage of ourselves and our people, and those European trading under the name of the National African Company Limited, I Umoru King of Mussulmans of Sudan, Sultan of Sokoto, with the consent and advice of my Council grant and transfer to the above people or others with whom they may arrange my entire rights to the country on both sides of the river Benue and river flowing into it throughout my dominions for such distance from its and their banks they may desire.

Art. 2 We further grant to the above mentioned company the sole right, among foreigners to trade in our territories and sole right among foreigners to possess or work places from which are extracted articles such as lead and antimony.

Art. 3/

Art. 3 We further declare that no communication will be held with foreigners coming from the rivers except the above mentioned company.

Art. 4 These grants we make for ourselves, our heirs, and successor for ever and declare them irrevocable.

Art. 5 The above named European Company (National African Company Limited) agree to make Umoru Sultan of Sokoto a yearly present of 300 bags of cowries in return for the above.

See Nigeria pamphlet No. 3 in Commonwealth Office formerly the Colonial Office Library. See also Pam. 30/27/70 Confidential No. 5051 Enclosure No. 284 p. 83. of treaties concluded between African Chiefs and the above named Company - copies are available in the Public Record Office in London.

29. P.S. de Brazza on behalf of the French Companies concluded agreements with the African Chiefs and Kings. Typical of such treaties was the following:

Art. 1 The Ossyeba Chiefs of the country which extends on the right bank of Inwindo, some distance into the interior between the confluence of Ouah and Foulah rivers being free from any other agreement, declare that they place their territory under the sovereignty and protection of France. They undertake on behalf of themselves, and their people of whom they are recognised Chiefs to raise the French flag to the exclusion of other than France.

Art. 4 The present treaty which has been discussed freely with the said Chiefs translated, and explained, commented upon and consented to by everyone with full knowledge of the fact is valid from this date. It will not however be considered definitive until after it has been ratified by the Commissioner General and the French Government to whom it shall be transmitted as soon as possible.

See - Liste des Documents Concernant les Traites passes entre Les Marchands et Les Chefs Africains au XVIIIe et XIX eme Sielles et conservees dans les Archives du Ministere des Affaires Etrangeres Paris.

MO Afrique, 47

fol. III - 113 V<sup>o</sup> Depeche du Ministere de la Marine au sujet de la tentative d'un navire anglais a renouer des relations commerciales a Portendick (Juin 1862) Annexes (1)

Extrait d'un rapport de M. Moll, Lieutent de vaisseau Commandant l'Archimede (17 mai 1862) 2 copie d'une lettre du gouverneur du Senegal (17th mai 1862) "Il parait que le capitaine de ce navire a voulu donne au Chef de Portendick une lettre adressee au roi des Trarza pour l'engager a recevoir l'annee prochaine deux batiments de Commerce anglais qui Viendraient sur la cote dans le but d'y etablir une escale ou deux" (fol. 112 V<sup>o</sup>).



fol. 118-122 Depeche du Ministere de la Marine au sujet d'une offre de cession a' la France d l'ile Matacong (26 novembre 1863) Annexe: (1) rapport de M. Poisson lieutenant de vaisseau capitaine de L'Africaine (2) extrait d'une lettre du gouverneur du Senegal (25 mai 1863) "Matacong fut achete il y a environ 40 ans par Stephan Gabbidon, negociant a Sierra Leone. Son fits William herita de cette ile, l'occupa et enfin l'hypothèque on fareur de MM. Ride et Dorfon, negociants de Sierra Leone M. Isaacs l'achete sur la demande de M. Gabbidon ... Outre le titre qui M. Isaac possedait et qui etait de chaucum des Chefs indigenes qui avaient encore quel ques pretentions de propriete sur Matacong. Il le fit d'abord pour s'assurer de bonnes relations de commerce avec ses Chefs, ensuite pour etablir de la facon la plus efficace ses titre de propriete.

M.D. Afrique 47

fol. 123-133 V Reponse du Ministere des Affaires Etrangeres (28 novembre 1863).

fol. 124-127 Depeche du vice-consul de France a Bathurst sur la praise de possession de L'ile Boulam par les Anglais (20 decembre 1863) "L'ile de Boulam de l'archipel des Bissagos ... fut achetee vers 1700 au roi des Biafares par le Francais Andre Brue gouverneur du Senegal et directeur de la compagnie des Indies. Il envoya dans cette ile un certain nombre de colons francais et des etablissements se creerent peu a peu a Boulam, Bissao, etc, pays occupe depuis presque completement par la Portugais. Peu de temps apres le paix de Versailles vers 1786 ou 1787 les Anglais essayerent de creer de etablissements dans l'ile de Boulam ... A leur tour, les Portugais, depuis longtemps etablis dans la se negambie merdionale ... reprirent l'idee abandonne par les Anglais ... et depuis cette epoque y current des factoreries dont l'importance alla toujours s'augmentant."

fol. 224-225 Copie d'une lettre adressee au gouverneur du Senegal par le capitaine du castor (14 octobre 1865)

"J'ai l'honneur de vous adresser les renseignements".

fol. 224-225 Copie d'une lettre adressee au gouverneur du Senegal par le capitaine du Coster (14 octobre 1865)

"J'ai l'honneur de vous adresser les renseignements que vous demander sur L'affaire de MM. Noque et Franz, negociants etablir dans La Mellacoree...

M.D. Afrique 55

fol. 147-150 V Extrait d'un rapport adressee par le capitaine du Renadin au Commandant de la Division navale des cote occidentales d'Afrique (28 octobre 1859)

"En 1854 avant l'establissement d'acune maison francaise, le Consul Campbell, de concert avec quelques negociants



anglais, Sardes et hambourgoers, fit signer au roi locemo un traite de commerce qui fut considere comme applicable a tous les negociants europeans presente et a ve nir, a l'arrivee de la maison Regis, il lui fut di qu'ette pourrait compter sur les conditions de garanties dudit traite (fol. 147 V<sup>o</sup> 148 V<sup>o</sup>)

M.D. Afrique 55

fol. 151 V<sup>o</sup> - 154 V<sup>o</sup> Note sur la meme sujet

fol. 244 V<sup>o</sup> - 245 V<sup>o</sup> Copie d'un accord passe entre le roi Docemon les negociants et les subre cargues des naxires mouilles dans la rade de lagos (23 mars 1854 annex a la lettre du Cdt. Didelot du 6 mars 1863).

fol. 367 V<sup>o</sup> - 370 V<sup>o</sup> Extrait d'une lettre du capitaine du Phaetou au sujet de la praise de possession les Anglais de l'ile de Boulam (1<sup>er</sup> septembre 1864, annexe a la depeche envoyee par le ministre de la Marine aux Affaires Etrangeres le 21 Novembre 1864) En 1792... un commercent avec un Chef de la rive opposee (qui a ce que disent les portugais n'avant aucum droit de le faire) se fit ceder Boulama et les iles environment. Le traite fut ratifie en 1827 par le gouvernement Anglais" (fol. 367 V<sup>o</sup> - 368 V<sup>o</sup>)

See also Le probleme des Chefs en Afrique noire Documentaries - 2509. 1959 translated by Pierre Alexandre. Notes and Studies, are semi official documents publised under the direction of the Prime Minister's Secretariat.

30. A similar right to exploit natural resources was conferred on the German East African Association by the Sultan of Zanzibar.

Art. VI His Highness (Sultan of Zanzibar) grants to the Association the exclusive privilege to search for and work or to regulate lease or assign in any part of His Highness territories within the limit of this concession any mines or deposits of lead, coal, iron, copper, tin, gold, silver, precious stone or any metal or mineral or mineral oil, whatsoever also the exclusive right to trade in the same, free from all taxes and dues excepting such moderate royalty on minerals only, not exceeding 5% on the first value of the article less the working expenses as may be hereinafter agreed by the Association - to be paid to His Highness, also the right to use all forests, trees, and other woods and materials of any kind whatsoever for the purpose of the works afore said and also for trade but the wood used for building and burning commonly known as borti - may be cut on the mainland by others as now by payment of such dues to the Association as they agreed upon, but no such dues shall be required for wood cut for His Highness use.

See Hertslet - Map of Africa by Treaty Vol. II reprinted 3rd Ed. 1967 p. 697.

The salient provisions of these agreements could be summed up as follows:-

The Sultan and Chiefs granted exclusive rights to the companies and their governments. These rights were also transferable to the heirs of the companies and their governments. The agreement equally conferred an exclusive right to various European companies to exploit natural resources within the territory of the Chiefs or Sultan with whom the agreement was concluded. In some cases the agreements required ratification by the Commissionaire General.

Apart from the European forms of concluding business transactions, there was also a binding form of contract in Africa itself; which did not require an exchange of written agreements as in the West. It was nonetheless an effective bond, to which, from the African point of view, the customary law of pacta sunt servanda applied. This form of contract or agreement was known as the ceremony of blood brotherhood.<sup>31</sup>

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31. The ceremony of blood brotherhood ran thus: The Chief's brother or one of the principal men or Elders would stand forth take his spears, his shields, and his sword, hold them above his head, and swear upon them, in the name of friendship eternal with the whiteman representing the company as follows: My hut is yours, by day or by night, my country shall welcome you as the son of the soil. If you were in trouble I and my warriors would be at your service to help you defeat your enemies, you could share with others the fruit of the soil. This was one part, then the European or the company's director would stand as the contracting party. His favourite would be held over his head, and his interpreter would stand forward and repeat his pledge: That I will be friend to those people, that my men shall not molest them, that if any crop/



Most of the early European agents in Africa, preferred it to the Western written agreements in their dealings with the African Chiefs, because its formal binding nature was well understood by the African nations. This view was supported by Lord Lugard, who in a paper delivered at the Royal Geographical Society in 1892 stated that:

"The nearest equivalent possible to our idea of contract is the ceremony of blood brotherhood. It is held in Africa among the most savage and civilised tribes as the most solemn and binding contract. The right is performed in various ways always with ultimate solemnity and empressment, the most important aspect is that the Europeans were welcomed as the sons of the soil (i.e. the citizen of the nation) who did not come to oust the Chiefs from their Kingdom.<sup>32</sup>

Undoubtedly the European companies in the first instance exploited the resources only under agreements concluded with the Chiefs. There was no evidence to show that the African people had lost control of their natural resources before their contract with the Europeans. Thus any acquisition of the right to work natural resources other than by agreement must have been against the will of the people i.e. the African nations. The validity of these statements is evidenced by

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is stolen, or any attack near my camp, I will help him (the Chief). He (the Chief) shall look to European as his brother whom he has to obey, but who has not come to oust him from his Kingdom and so on. After the pledge, by the whiteman, the Chief would then produce two pieces of meat either of fox or goat. A piece would be eaten by both the Chief and the whiteman the blood brotherhood took place. The basic idea of swearing with the sword above the head, was the simple belief that, if either of the parties turned a traitor or violated the contract, his sword would turn against him. This accounts for the solemnity with which the ceremony of blood brotherhood was observed as a binding contract or bond.

32. Proceeding of Royal Geographical Society 24th Nov. 1892 p. 817.



the testimony of treaty makers themselves. Thus the French view was expressed by the Commandant Toutee - one of the most successful of all French treaty makers, as follows:

Quand un etat ou une tribu negre peu importe, a commis l'imprudence grande de donner l'hospitalite a un voyageur blanc, ce dernier n'a rien de plus presse que de sortir de sa poche un traite d'alliance tout imprime, et de ses cantines un petit drapeau national. Le voyageur signe le traite pour son propre compte et prie le roitelet, plus ou moins colore d'ajouter sa signature a la sienne.

Si le potentat negre ne sait pas signer, comme ce dernier cas se presente neuf fois sur dix, la haute partie contratante et civilisee signe pour la deuxieme supposee sautage et le tour est joie.

Il est arrive meme quelquefois que le voyageur blanc s'il est anglais surtout a oublie de demander son nom au negre signataire, mais le vice de forme n'a jamais ete considere<sup>33</sup> comme une cause serieuse de nullite du contract.

Equally significant was the reason given by Lord Lugard in connection with an agreement concluded on the behalf of Royal Niger and National African Companies (although the latter company was called National African Company, it was a foreign company incorporated in Britain), for his refusal to use the companies forms while making an agreement with Eiyeki Waiyaku a Kikuyu Chief, he said:

I now presented him with a flag and explained its use. I also made treaty, but as I do not believe in the printed forms of the companies, by which a man gives land and the right to rule to the company in exchange for their government and protection, I made out my own treaty form. This Company treaty is an utter fraud. No man, if he understood would sign it, and to say that a Chief has been told that he has ceded his right to the company in exchange for nothing is an obvious untruth. If he has been told that the companies would protect him against his enemies as an ally, he has been told a lie, for the company have no intention and no force to do it, if they wished.<sup>34</sup>

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33. Lord Lugard Dual Mandate in British Tropical Africa with introduction by Perham 1965 p. 16.

34. Lord Lugard Diary Vol. I p. 318.

When an extract of a company's agreement is compared with the ceremony of blood brotherhood, many differences emerge. The ratification clause in a typical company agreement<sup>35</sup> was non-existent in the ceremony of blood brotherhood. Perhaps the equivalent of ratification was the requirement of presence of Elders and Headmen as witnesses at the latter ceremony.<sup>36</sup> In some of the companies agreements, there was provision for the right of inheritance<sup>37</sup> in the event of death of a signatory. This in effect was contrary to the African concept of ownership of natural resources; where, if an individual died, his tenure reverted to the nation.

It is worth remarking that it is difficult to differentiate between the privileges and obligations, when the companies agreements are compared with the ceremony of blood brotherhood. The only clause conferring what might be thought of as privileges and obligations was that in the pledge, by which the European was acknowledged to be a son of the soil (i.e. citizen of the nation by the African concept) who could not therefore oust the Chief from his Kingdom. He, the European, could enjoy the same privileges as other members of the nation.

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35. Art. 7 of the agreement between the Ossayeba Chiefs and French Companies, see footnote no. 29.

36. See footnote 8 (C.O. 879/35 No. 65).

37. Art. 1 of the agreement between the African National Company and the Sultan of Sokoto, see Footnote 28.



In certain agreements, clause requiring payment of a certain amount to the Chief was stipulated.<sup>38</sup> One might think such payment represented a royalty for the granting of the concession but to some Chiefs, it amounted to a tribute which every son of the soil has to make regardless of his possessions.<sup>39</sup> In the light of the above comparison, one can see the different legal systems involved in African nations and companies early economic transactions. However there were a lot of loopholes in these agreements compared to modern contracts, but apart from this criticism, it served the need of the time.

B. The Legal Significance of Agreements Concluded Between African Chiefs and the European Companies

The importance of the control of natural resources by the African people (i.e. nation) through the Chiefs was manifested in the companies transactions with one another. In the first instance, the agreements which were concluded between the Chiefs and European Companies, were considered necessary to gain international recognition for concessional claims, and as evidence to refute rival claims. Secondly, in the negotiations between European Companies themselves,

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38. Ibid, Art. 5.

39. Chief Lobengueala applied the same tactics over the disputed Rudd concession, See G. Padmoore "How Britain Ruled Africa" 1936 p.29.



such agreements were also useful for bargaining purposes.<sup>40</sup> One type of bargaining advantage was that the agreement endowed the particular resources with an exchange value. Any concession obtained by an agreement could be ceded to another company in return for a counter concession. Thus the agreement was recognised by third parties.

Another kind of bargaining advantage was derived from the use of the agreement in border negotiations. The land claimed could sometimes be extended by reference to the existing borders of an African nation with whose Chief the company claiming the disputed land had entered into an agreement. An example of such a situation was shown in making the map of the border between Kenya and Tanganyika near Mount Kilimanjaro. In that region, British and German companies agreed in 1866 and subsequently confirmed 1890 to specify their respective border line between Tevata and Chagge. In construction of the map showing the British border line between Tevata and Chagge, the companies relied on the agreements which Harry Johnson obtained from the African Chiefs; whereas the German companies based their construction of border line in the same region on the agreement obtained by Karl Peters

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40. Examination of treaty right was accorded much attention by the Niger Commissioner charged with negotiating Anglo-French boundaries in West Africa. See G.P. Crooch and Temperly in British document on the origin of the War 1927 pp. 138-140.

from the Chiefs.<sup>41</sup> Great Britain and Germany adopted similar methods in settling their border differences in the Cameroons.<sup>42</sup>

In 1823 in an international arbitration between Great Britain and Portugal, regarding Delagao Bay, Great Britain contested the legality of Portugal's claim thereto on the basis of a treaty concluded between Great Britain and the native Chiefs.<sup>43</sup>

Generally speaking agreements between Chiefs and companies, such as the Royal Niger Company, and the Comite Special du Katanga, not recognised in international law as members of the family of nations i.e. states, are not in a strict international legal sense treaties or conventions.<sup>44</sup> On the other hand, contracts of this nature are not wholly void of indirect effects in situations governed by international law. They are nonetheless evidence of which the law must in the circumstances take account.

### III. The Colonial Phase

#### A. The Demise of Native Control of Natural Resources

The exploitation and disposal of the natural resources of African Kingdoms entered its third phase, when foreign governments became involved and gradually replaced the chartered companies. The whole mechanism, by which the Chiefs controlled the resources, was disrupted. The working

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41. British and Foreign Papers LXVII p. 1130.

42. John Keltie, The Partition of Africa 1895 p. 194.

43. British Parliamentary Papers LXXX III 1875 p. 137.

44. Vienna Convention on Law of Treaties Art. 21(a) 1969.



of natural resources changed hands from the less industrialised African Chiefs and their nations to the well organized and industrialised European Communities.

The issue of the exploitation of natural resources and raw materials of the African territories came to be regarded as vital only to the issue of security, if not as part of the security itself - How was the industrial state to assure itself of a constant supply of raw materials; if it did not control the territories in which there were assured deposits, it would be at the mercy of its rivals, who might decide at any time to strangle its industrial life. International control of the supply of raw materials was not believed to be within the range of practical statesmanship. Therefore the contending major states - Great Britain, the Netherlands, France, Germany and Portugal relied on their political strength to give them the assurance they needed. Contrary to the pledge made by the companies not to oust the Chiefs from their Kingdoms, by 1894 almost all African Kingdoms had become colonies of one foreign state or the other. Thus the power to conclude agreements which previously was the prerogative of the Chiefs passed on to the new sovereigns.

#### B. Ownership of Mineral Rights

On the assumption of control of natural resources by the colonial powers, the concept of ownership of mineral rights changed drastically. The idea that the resources were the property of the nation to be used for common good gave



way to the concept of state ownership. The law defining property in mineral rights in most cases followed the pattern of the colonial power concerned.<sup>45</sup>

Most colonial legislation provided for the customary rights of natives to exploit minerals and prohibited the grant of concessions in areas where this right was exercised, but the natives were not treated as the owners of the subsoil rights.<sup>46</sup> It was however clear that these mineral resources could not have been mined by the natives in quantities comparable to those extracted under modern colonial conditions. The legislative intention was therefore to maintain the status

45. The law in the Belgian Congo (now Zaire) vested all mineral rights in the State, since the annexation by the Belgian government any mineral concession had under the law of Oct. 18th 1908 required the authorization of the home government. See Decree of 8th June 1888. In the French colonial territories, the State reserved to itself the rights to minerals, which were expressly excluded from any concession of land made. See Decree of 6th July 1899. See also The Mining Laws of the British Empire 1920 Vol. 1.
46. French Decree of 5th July 1899, Oct. 22nd 1926, Oct. 13th 1933, (French West Africa) and July 8 1926, Dec. 23 1934 (French Equatorial Africa). In Transval and the Orange Free State, the natives were allowed to reserve a portion of the land for mining on their own account and received a share of the licence fees paid by claim and stand-holders. See Act 31 of 1898, and 16 of 1907, (Cape) Act 43 of 1899 (Natal) Ordinance 3 of 1904, and 8 of 1904 (Orange Free State) Act 35 of 1908 (Transval). In the Katanga region of the Belgian Congo (now Zaire) special authorization was necessary for prospecting on land in native occupation, and the native working of mineral resources in Ruanda-Urindi were protected. See Decree of 1888, 1893 later repealed in 1937.

quo ante and not to invest in natives any wide power of over mining, especially at a time when mineral raw materials first acquired commercial value.

The existence of a system of state ownership, or of governmental rights akin to state ownership of mineral rights, had obvious consequences in the fields of legislation and administrative regulation. The concession issued by the state was usually a temporary right to exploit a mine or reservoir, the ownership of which remained with the state after the concession expired.

### C. Systems of Mineral Control

The measures taken by the colonial powers to control the mineral resources of the African territories depended upon many factors. Two of these factors played an important role in the formulation of the African mineral legislation.

(i) Each power wanted to establish for itself a monopoly of (the use of) minerals of the subsoil;

(ii) The non-renewable character of mineral resources necessitated restrictions and control.

The first approach the colonial powers adopted in African territories to ensure that the state controlled the minerals of the subsoil was to declare vast areas unoccupied by the natives as Crown Lands.<sup>47</sup> While grants of land under this

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47. The United Kingdom of Great Britain adopted the method of declaring vast areas of unoccupied land in its African territories as the Crown Land, See Land Act of 1918 No. 7 Also G. Stone The Mining Law of the British Empire 1920. The French legislation of land acquisition did not differ from that of Great Britain, Art. 713 of the French Civil Code/



system were made to the settlers through the colonial governors, the system was used and originally devised largely to control non-indigenous acquisition of land from the natives; at the same time the locals were not allowed to sell their lands to foreigners. No land transactions could take place without the approval of the Colonial Governors or the Conservateur de titres Fonciers.<sup>48</sup> Under the new system of control by which the Chiefs were eliminated, any occupier of land must obtain a certificate from the colonial governor. Such a certificate granted to the holder the right of occupancy. Where foreigners were allowed to own land, they must also obtain a certificate from the governor, but such certificates were usually limited to leasehold, and did not confer on the holder rights over the minerals of the subsoil. The state reserved the right to enter upon any land sold or leased under

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code stipulated that goods without an owner belonging to non-specific individual belong to the state. See Decree of 28th September 1926, See also Decree 55-580 of 25th May 1955 for the French Equatorial Africa.

An identical method prevailed in Belgian African territories. Ordinance 1st July 1885, Decree of 14th September 1886, See also Rapport de la Commission des Colonies No. 87 1936.

48. In Belgian African territories, land registration was done by Conservateur de Titre Fonciers Decree 14th Sept. 1886 Arret 8th Nov. 1886. The French Government had similar procedure called immatriculation - See Decree of Jan. 5th 1923. For the United Kingdom of Great Britain practice, see Mines Manual of 1916, which went through a series of amendment up til 1948 cap. 134 p. 96 8 (1). The Residence of each province was empowered to handle land matters subject to some cases to the approval of the Governor General.



any act to search for minerals, to mine, and to remove any minerals.<sup>49</sup>

It is noteworthy, that despite the differences in the constitutional and economic policies adopted by various colonial powers in their African territories, there were similarities in control of the mineral resources through land legislation. In other words, it was common colonial practice to keep mineral exploitation under strict control.

(iii) The recognition that minerals are a wasting asset necessitated a vast range of measures designed to restrict foreign participation in the domestic mineral industry of the colonial territories.<sup>50</sup> The reasons for such restrictions

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49. British Land Act 1918 No. 7 s.21(1)-(3). All alienation of Crown Lands contained reservations of minerals to the Crown. See Precious Stone Act of 1927. In French African Colonies, the State reserved to itself the right to minerals, which were expressly excluded from any concession of land made.  
See Lord Hailey An African Survey 1938 p. 1520.

50. For the most part mining rights come under the general provisions of commercial treaties defining the right of nationals of each contracting party. See for example the Agreement concluded between Great Britain and the French Government of 1920, See League of Nations Treaty Series No. 22. The two governments agreed to support their nationals in any common negotiations for securing concessions. In the same treaty, it was agreed that the British nationals would participate to the extent of one third in oil concession in French colonies; and the British government allowed the French nationals the same proportion in the Crown colonies.  
For detailed discussion of the said agreement see Rawles William P. Minerals in International Agreement - Political Science Quarterly Vol. 48, 1938 p. 514. Great Britain concluded a group of treaties with Denmark, Greece, Norway, Portugal, and Sweden in 1920, 1921 concerning capitulation in Egypt, whereby the nationals of each of these states received the promise of the same rights as those enjoyed by the British nationals in Egypt for several matters including mining privileges. Ibid, p. 530.

varied from place to place; but common among them was the fear of future shortages, the fear of being put into a disadvantageous commercial position by the nations, the desire to maintain supplies in case of war. Equally significant was the desire to get as large a return for the colonial powers as was possible from the development of natural resources and the smelting and manufacturing processes were therefore also designed for the profit of the powers concerned.<sup>51</sup>

Another method adopted by the colonial powers to control mineral resources, was the issuance of prospecting and mining licences in the form of concessions. This advanced approach to the working of natural resources was non-existent in early African period of control. It was true that the natives worked natural resources, but no distinction was made between prospecting and mining.

The direct influence of States on mineral development was seen prominently in the conditions laid down for the prospecting and mining of metals, and the claims made on the product whether by way of royalty or taxation. Regulation of this type had a profound effect on prospecting, and mining, the more so as they also determined whether development should be in the hands of the small prospectors or of the large financial organisations. Their character was shaped to a great extent by the system of tenure applied to mining rights.

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51. C.K. Leith *World Mineral and World Politics* 1931 p. 80.



The duration and the extent of prospecting rights differed in colonial territories. In some countries the prospecting right was valid for one year in an area of 8 square miles in respect of ferrous metals, and in a two square mile area in the case of precious metals.<sup>52</sup> In other places, the prospecting right was granted over an area of five or ten square kilometres and was valid for two years, renewable up to six years, the second renewal being granted only if the holder of the licence had spent a specified amount of money in the first area of operation.<sup>53</sup>

A mining concession, like a prospecting licence, took various forms. Some colonial powers preferred to give the concession to big mining corporations in perpetuity.<sup>54</sup> Others

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52. The United Kingdom practice varied. In some places the area and years of prospecting was defined for example in Nigeria - See Law Cap. 39 and Mineral Amendment Ordinance 1927. One finds again that no limitation as to the area, and duration was imposed upon concessions obtained before 1895, but Ordinance of 1900 restricted the area to 5 square miles in the case of gold.
53. The French Government had specified procedure by which any renewal application must accompany the account of approximately 20,000 spent on the previous prospecting area, See Hailey op. cit. p. 1528.
54. The sole right to exploit mineral resources of Katanga extending over 1500 Klm. was assigned until 1990 to the Union Miniere du Haut Katanga, Campagnie des Chemis des Fer du Congo Superieur aux Grands Lacs Africains, See T. Hayse and H. Leornard Regime de cession et concession de terres et de mines du Congo Belge 1932, p. 324.



preferred a concession to run from 75<sup>55</sup> to 99 years.<sup>56</sup> Apart from these limitations certain colonial powers stipulated that three quarters ( $\frac{3}{4}$ ) of the personnel of any directorate of mining concerns must be of their nationality.<sup>57</sup> When examined thoroughly, the various devices of restricting the size of operations of concessionaires, and in some cases the term or, if granting to citizens, rights in perpetuity had the purpose of bringing each operation or exploitation of natural resources under state scrutiny, for, as the owner of the mineral resources, the state had a proprietary interest to protect from damage or abuse by the concessionaire.

Another impact of state control of natural resources was on revenue, by taxation of mineral resources enterprises. The financial relation between the colonial powers and the mineral industry was distinguished by the special feature that where a state had assumed ownership of mineral resources, it in addition claimed a share of the proceeds, representing the public interest in the asset on which the industry was drawing. The areas where

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55. In French Colonial system the holder of a permis d'exploitation (Permit for exploitation might be granted as concession for 75 years with the right to renew for a further twenty five years at the annual rental of .050 francs per hectare for the first six years and 5 francs thereafter, see Hailey op. cit. p. 1528.

56. The agreement which conferred the monopoly to Sierra Leone Selection Trust Diamond Company was granted for 99 years by the British Government. The agreement was concluded on 5th October 1734 and was repealed in 1946, See the ratification Ordinance no. 63.

57.

royalty was taken, a variety of forms prevailed.<sup>58</sup> One method was to levy a fixed sum per unit of production.<sup>59</sup> The colonial powers also taxed the profit of various enterprises, as part of their prerogative.<sup>60</sup>

The above investigation has disclosed that the colonial powers managed the exercise of subsoil rights, which were however owned by the state. Mineral and petroleum exploration and exploitation by nationals or foreigners were in most countries subject to grant by the state of right embodied in a

58. In examining the methods by which the royalty was taken by the colonial powers, it must be noted that in certain areas, it was not available to the state. In Northern Rhodesia (Nyasaland) or older concessions held in South African protectorate or Maliloland of Bungenda. This was the case because in 1893 the British South African Company received from the Commissioner and the Consul General in British Central Africa certificates of claim for 2,855,000 acres in Tanganyika district of Northern Rhodesia. It proceeded to make grants on the strength of these certificates and the agreement with the Chiefs and although its authority to do so was open to doubt, its action was subsequently recognized by the British Government. For details of the concession issued by the above named company by virtue of the certificates, see North Charterland Concession Inquiry, Colonial 73, 1932. Again in Belgian Congo, the state had preferred retaining shares in the profit of the company to receiving royalty. See Hailey, op. cit. p. 1530.
59. See the Imperial Institute Study on Royalty and Mining Rents in British Empire 1936.
60. The Belgian Government based its tax system on the ratio between profit and capital. See Decree of 1937 which later extended to Ruanda Urundi. There existed various forms of assessment of tax on profit in British overseas territories, In its African territories for example on iron ore in Sierra Leone, 5 per cent of the assessable profit was payable. The rate on diamonds is 5% of net profits and on export duty of  $6\frac{1}{4}\%$ . In Gold Coast (Ghana)  $27\frac{1}{2}\%$ . See Diamonds Tax Proclamation No. 29 of 1931.



permit, licence, lease or concession. Usually subsoil rights were deemed to be separate from rights to surface deposits, and were declared either to be owned by the state or to be subject to governmental authorization regardless of ownership. The mining of mineral deposits was generally granted to the discoverer who could prove financial competence. In some cases the concession did not require the holder to pay to the state any royalty related to production. The concession was in some cases granted in perpetuity and provided a security of tenure approaching that of a freehold.

The state reserved the right to maintain public order and to expropriate private goods for public utility on payment of compensation according to the principles of international law; the right of approval of operational plans to ensure that exploitation was rational and not wasteful. The state also controlled safety plans and measures. On these bases, state intervention was therefore frequently justified from a legal view point by the need to protect state property, rather than on the mere illusory basis of public policy or exercise of police power.

#### IV. CONCLUSION

The importance of natural resources in African economic life was realised before the advent of the European in those territories. This was evidenced not only by the communal ownership of the resources, but also by the strict control exercised by the Chiefs, which prevented foreign economic intrusion. Further evidence of the control by the Chiefs was evidenced by the agreements by which the companies acquired



the rights to work natural resources. The control exercised by the Chiefs not only manifested itself in the administration of native working of natural resources, but also in the settlement of disputes and acceptance of responsibility regarding the exploitation of these resources. The right of Chiefs as the sole administrators of natural resources, which formed the basic medium of exchange, continued until certain changes were introduced which were soon intensified by the needs for raw material in Europe.

The changes which began with the involvement of foreign European chartered companies were later superseded by state takeovers of the administration of the natural resources industry in African territories i.e. by the states in which the original companies were incorporated. These takeovers by the foreign states brought changes in the mineral industry, further resulting in increased participation by the colonial powers in all aspects of the mineral industry - exploration, development, production, and marketing of mineral products both in domestic and in foreign fields, receiving royalty and imposing taxation.

Finally, it must be said that the various control devices employed by the colonial powers in their African territories resulted in a highly chaotic and shifting situation, which provoked an awakening in the Metropolitan countries to the value of mineral or natural resources to the national economies, and to the fact that the mineral deposits were wasting assets demanding control by the colonial states rather than the companies.

CHAPTER IITHE DEVELOPMENT OF THE CONCEPT OF PERMANENT SOVEREIGNTY OVER  
NATURAL RESOURCES IN THE UNITED NATIONSINTRODUCTION

The previous Chapter disclosed that the control of natural resources of the African territories by the African Nations, was interrupted, when they became colonies of foreign states. On attainment of independence, the African States sought to re-establish their sovereignty over natural resources. The venue chosen to put their case at a global level was the United Nations. The issue was raised in 1952 at the eighth Session of the Human Rights Commission.

In that Commission, delegates of the developing countries were preoccupied with seeking international recognition of their right to control natural resources for public purposes. In their view the best way was by nationalization or state takeover of foreign assets in the natural resources industry. The delegates of developed countries were not opposed to this right provided that in carrying it out, the developing countries abided by the principles of international law requiring the payment of adequate and prompt compensation.<sup>61</sup>

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61. U.N. Doc. A/AC 97/S.R.22 at 6, the delegate from Sweden noted that while the transfer of ownership was possible through legislation, it should be in conformity with generally recognized principles of international law, which prescribe that compensation should be paid to the dispossessed owners. See also U.N. Doc. A/AC 97/S.R.30 at p.7, U.S.A. Delegate's view.



The developing countries argued that having achieved political independence, it was necessary for them to control their resources, and utilise them for the benefit of their people. In which case they upheld the right to expropriate for the reasons of public utility according to the principles of international law.<sup>62</sup>

#### I. Economic Self-determination

The high point of disagreement was reached, when a draft resolution emphasizing the unlimited sovereign right of all countries to exploit and dispose of their natural resources as a constituent element of the right of economic self-determination was passed in the Committee on Human Rights in the following terms:-<sup>63</sup>

'bearing in mind the need for encouraging the underdeveloped countries in the proper use and exploitation of their natural resources.

Considering that economic development of the underdeveloped countries is one of the requisites for strengthening universal peace.

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62. Prof. Gillian White - Nationalisation of Foreign Property 1961. B.A. Wortley, Expropriation in the Public International Law 1959 p. 25. Sacks, Les reclamations diplomatiques contres les Soviets 1939 p. 20. Kunz, Mexican Expropriation contemporary pamphlets series 5 1940 pp. 54-55. S. Friedmann, Expropriation in International Law 1953 p. 1142. Expropriation for public utility is supported in Judicial decisions for example in Walter Fletcher Smith a U.S. citizen's land was expropriated by the Cuban Government, The presiding Judge disqualified the Cuban Expropriation because it was not based on public utility, which Art. 32 of the Cuban Constitution itself advocates. See Whiteman - Damages in International Law Vol. 2 pp. 1408-1412, See also 2 U.N. R.I.A.A. p. 901 Goldenberg Case, for the views expressed by the arbitrator see p. 909. See also P.W. Shefeldt v. the Government of Guatemala 2 U.N.R.I.A.A. at 1079 p. 1095.

63. G.A. Res. 5th Feb. 1952.



remembering that the right of the people freely to use and exploit their natural resources is inherent in their sovereignty.

recommends member states to maintain proper respect for the rights of each country freely to use and exploit its natural resources as a necessary factor in its progress and economic development and therefore to refrain from the use of any measures such as might jeopardise the execution of a programme of integrated economic development or economic stability of under-developed countries and economic cooperation amongst the world at large.<sup>64</sup>

The value of the above proposition is dependent on the status of self-determination in international law.

A. Legal Nature of Self-determination

An argument was put forward by the developed countries that the principle of self-determination was a political and not a legal right.<sup>65</sup> It was also maintained that such a principle had no place in covenants on Human Rights. One may agree with the above views, if one relies on the fact that before the adoption of the Charter of the United Nations, the principle of self-determination as a legal right, cannot be said to have existed, although it was often the basis of many movements for independence and succession. For instance in Aaland case between Sweden and Finland, which was all about whether the Islanders who were under Finnish jurisdiction could opt to join Sweden in the exercise of the right to

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64. U.N. General Assembly Official Record 9th Sess. 3rd Committee A/C 3/SR 570.

65. U.N. ECOSOC Council Official Record 32nd Sess. 1178th meeting at 172.

self-determination, especially in the view of the fact that Finland itself obtained independence from Russia in recognition of that right. Sweden wanted the people to decide their future in plebiscite, but Finland insisted the demand was interfering with its domestic jurisdiction. The Committee of Jurists appointed by the Council of the League of Nations to examine the case found that:

'....Positive International Law does not recognise the right of national groups as such to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognises the right of other states to claim such separation.'<sup>66</sup>

At the initiative of Soviet delegates at San Francisco the principle was inserted in Art. 1(2) of the Charter of the United Nations.<sup>67</sup> The article enumerates as one of the purposes of the Charter, the development of friendly relations among nations, based upon respect for the principle of equal rights and self-determination of the peoples. On the same issue of self-determination Judge Nervo said in the South West Africa case that concepts of equality and freedom regardless of colour 'will inspire the vision and conduct of the peoples, the world over until the goal of self-determination is reached'.<sup>68</sup> He stated further:

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- 66. League of Nations Official Journal Special Supplement no. 3 1920 p.5.
  - 67. Russel and Muther History of United Nations Charter 1958 p. 811.
  - 68. ICJ Report 1966 p. 457.



... 'the sacred trust of civilisation (the mandate system) is a legal principle and a mission where fulfillment was introduced to more civilised nations until a gradual process of self-determination makes the people of the mandated territories able to stand by themselves in the strenuous conditions of the modern world.'<sup>69</sup>

It was on this basis that developing countries argued that the enjoyment of every other Human Right stems from the principle of self-determination.

B. Self-determination in the United Nations

In the practice of the United Nations, there has been a consistent affirmation of the principle of self-determination as a legal and basic human right. At the fifth Session, the Assembly recognized the principle of self-determination as a fundamental human right.<sup>70</sup> At the sixth Session it directed the Committee on Human Rights to include in draft of the covenant on human rights an article on self-determination.<sup>71</sup> This, the Commission implemented.<sup>72</sup> The article adopted by the Commission included the concept of sovereignty over natural resources - a concept which has been accepted as a constituent

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69. Ibid, pp. 465-6.

70. G.A. Resolution 421 (V).

71. Ibid 565 (VI).

72. See Report of the 8th Session of the Commission on Human Rights U.N. ECOSOC 14th Session Supp. No. 4 E/2256 of 19 52.

element of self-determination.<sup>73</sup> It is concerned with the sovereignty of a state to control and dispose of its natural resources subject to some limitations. The article so adopted received the approval of the Commission in 1955. On a subsequent occasion, the General Assembly reaffirmed the principle of self-determination generally<sup>74</sup> and in relation to specific non-self-governing territories.<sup>75</sup> The Security Council of the United Nations also recognised the principle of self-determination.<sup>76</sup>

Evidently the argument that self-determination is a political and not a legal right has been rejected by the United Nations.<sup>77</sup> In fact Rosalyn Higgins is of the opinion

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73. G.A. Resolution 1314 12th Dec. 1958.

74. Ibid, 1188 (XII) G.A. Resolution 637A (VIII).

75. For the detailed study of occasions on which the General Assembly invoked the principle of self-determination, see the following - G.A. Res. 545(VI); 1188(XII); 11th December 1957, 637A (VII) 16th December 1952, On specific territories see G.A. Resolution 1819 (XVII) of 18th Dec. 1962 on Angola, Resolution 1573 (XV) of 19th Dec. on Algeria, 1951, Resolution (XVIII) of 11th Dec. 1955 on Fiji, Resolution (XVIII) of 11th Dec. 1963 on British Guinea, Resolution 1807 (XVII) 14th Dec. 1962 ibid. XVIII 11th Dec. 1949 on Aden. Resolution (XVIII) 1952 11th December 1963 Northern Rhodesia.

76. Security Council Resolution of 9th June 1961 - U.N. Security Council Official Record 18th Supp. April-June S/4835 of 31st July 1963. See also Security Council Official Record July-September S/5380 and Cor. 11 on former Portuguese Colonies.

77. China U.N. Gen. Ass. Off. Rec. 9th Sess. 3rd Committee 135/A/C.2/SR570); France ibid 3rd Committee 116/A/C.3/SR556. Report on 10th Sess. of Commission on Human Rights U.N. ECOSOC Official Record 18th Sess. Supp. No. 7 36/E/25/73 1954.



that declarations taken together with so many years of evolving practice by the U.N. Organs provide ample evidence that there exists a legal right to self-determination which within certain limits does not admit of reservations of Art. 2(7).<sup>78</sup>

The United Nations has passed resolutions on Cyprus, Morocco, Tunisia, and other territories which ultimately made their impact on administering powers. In fact Portugal has just implemented the resolution by granting independence to its former colonies of Mozambique and Angola.<sup>79</sup>

C. The Views of Publicists

As for the validity of the concept of self-determination in international law, the opinion of jurists differ. For example Professor Schwarzenberger is of the opinion that 'the principle of self-determination is a normative principle of great potency, but not yet part and parcel of international law'.<sup>80</sup> On the same issue, L.C. Green said that it is not a right under international law; customary international law does not recognize such a right, and as yet there are but few

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78. Higgins, Rosalyn - The Development of International Law Through the Political Organs of the United Nations Organisations 1963 p.104.

79. By advancing the dependent nations to independence, the former major administering Powers have given firm recognition to the principle of self-determination in regard to colonial people. See International Legal Materials, Vol. 13 1974 p. 1467.

80. Prof. Schwarzenberger, A Manual of International Law 1960 p. 74.

treaties that concede it.<sup>81</sup> On the other hand, legal writers from the Communist bloc uphold self-determination as a principle of international law, since it is a precondition for peaceful coexistence.<sup>82</sup> Levin argues that "the principle of self-determination of nations expresses the law, consciousness of the masses. It has also become a primary international legal principle."<sup>83</sup> Lachs maintained that the Charter of the United Nations merely restated the existing law. Further he maintained that, all the Charter provision did, was to conform and lay down in writing a principle that had long been growing and maturing in international society, until it gained general recognition thus giving expression to (one of the elements of) international law of our time.<sup>84</sup> In one of his articles, he contended that "self-determination is a definite legal principle" and it is laid down in the Charter of the United Nations, the most solemn document, which is binding on ... states of the world today. On this very principle other elements are built. From it emanates both right and duties in international relations".<sup>85</sup>

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- 81. Report of the 47th Conference of International Law Association 1956, p.58.
  - 82. Vyskinsky The Law of Soviet State 1948 p. 249.
  - 83. Levin The Principle of Self-determination of Nations in International Law - Soviet Yearbook of International Law 1962 p.48.
  - 84. Lachs - The Law in and of the United Nations Organisation - Indian Journal of International Law 1961 p. 432.
  - 85. Lachs, Some Reflections on the Problem of Self-determination - Review of Contemporary Law 1957 p.2. See also Babrov, R.L. Basic Principles of Present Day International Law in (Tunkin - Edited) Contemporary International Law 1969 p.51. Baratashvili D, International Law and the States of Asia and Africa 1968 p. 35.



In the Western World, there is convincing evidence that self-determination has been recognised as a principle of international law, despite its lack of precise definition. As far back as 1920, P.M. Brown admitted that self-determination was a fundamental principle of international law and order, though undefined, and though no rules for its application had been formulated. Whatever may be the difficulty in its application, he maintained that only in self-determination characterised by common consent rather than coercion was to be found the freedom, prosperity, and happiness of Central Europe and the whole world.<sup>86</sup> Quincy Wright looks at the principle from the same perspective as Brown, as an emerging principle resulting from the modern feeling for internationalism directed chiefly at decolonisation, respect for which obligation is undertaken under the Charter; but he added that "Whether it can be reduced to rules of law sufficiently precise to admit of judicial application is doubtful."<sup>87</sup> Ross admits that it is quite impossible to define by any precise or rational criterion the group to which this right belongs.<sup>88</sup>

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86. P.M. Brown, Self-determination in Central Europe - American Journal of International Law Vol. 14 1920 p. 235.

87. Quincy Wright; The Role of International Law 1961 p.28.

88. Ross, Constitution of the United Nations, 1950 p.135.

Elihu Lauterpacht is of the view that international law acknowledges the principle of self-determination, thus providing the meeting point of customary law and democratic principle. Indeed, it is in this area of self-determination that (so far) the development of human rights in the international sphere as governed by customary international law has made its greatest progress.<sup>89</sup> Rosalyn Higgins suggests that it is inescapable that self-determination has developed into an international right and is not an essentially domestic matter but the extent and scope of the right is still open to some debate.<sup>90</sup> S.J. Starke points out, that there is now "a wider general recognition of the right of self-determination and of the correlative duty of states administering dependent territories to transfer power to the people thereof".<sup>91</sup> Ian Brownlie states unequivocally that 'self-determination is a legal principle.'<sup>92</sup> Among the writers from the developing countries self-determination as a legal principle has been accepted; thus Umozurike concludes that 'the legal nature

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89. E. Lauterpacht, Some Concepts of Human Rights, Harvard Law Journal, 1965 pp. 270-1.

90. Higgins, R. op. cit. p. 103 (note 78).

91. S.J. Starke - An Introduction to International Law 1967 p. 116 (6th ed.)

92. Brownlie, Principles of International Law 1966 p. 484 (1st ed.)



of the principle of self-determination, though rejected by some, is receiving a wider acknowledgement by the text writers of the world.<sup>93</sup>

The International Commission of Jurists which is concerned with the development of law in response to changes in human relations resolved at a Congress held in Athens in 1955 as follows:-

(a) The recognition of the right to self-determination being one of the greatest achievements of our time, and one of the fundamental principles of international law, its non-application is emphatically condemned.

(b) Justice demands that people or ethnic or political minorities be not deprived of their natural rights and especially of the fundamental rights of man and citizens or of equal treatment for reasons of race, colour, class, political conviction, caste or creed.<sup>94</sup>

There was no doubt as to the legality of the principle of self-determination during the time the Pacific Charter was

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93. Umozurike O., Self-determination in International Law 1972 p. 80. See C.N. Okeke - A Controversial Subject of International Law 1974 p. 111.

94. International Commission of Jurists Congress held in Athens in 1955 Resolution 3. Committee on Public Law Resolution 3, See also the Rule of Law and Human Rights Principle and Definitions (International Commission of Jurists, Geneva 1966). See also Yearbook of International Law 1974 Vol. II Part One p.7.

drawn in 1954,<sup>95</sup> and by the Conference of Non-aligned States held in Belgrade in September 1961 and in Cairo in October 1964<sup>96</sup> (forty seven States). The first World Conference of Lawyers on World Peace through the Law, in their declaration of general principles for a World Rule of Law adopted a Resolution to this effect:

"In order to establish an effective international legal system under the rule of law which precludes resort to force. We declare that ... a fundamental principle of the international rule of law is that of self-determination of the people as proclaimed in the Charter of the United Nations."<sup>97</sup>

In the light of the above evidence, it is observed that the views of writers on the principle of self-determination are not identical. Regardless of the fact that the majority of writers favour the practice of the United Nations - i.e. accept the principle of self-determination as law - there are others who doubt the legality of self-determination in international law because there are as yet few treaties that concede it.<sup>98</sup> The latter view can be contested on the examination of

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95. This Charter was proclaimed in Manila by Austria, France, New Zealand, Pakistan, the Phillipines, Thailand, United Kingdom, and United States of America. They agreed to uphold the principle of equal rights and self-determination of the peoples and they will earnestly strive by every peaceful means to promote self-government and to secure the independence of all countries, whose people desire it and are able to undertake its responsibility - see Umozurike op. cit. p. 186 footnote no. 37.
96. Indian Journal of International Law Vol. 4 1964 p. 599.
97. American Journal of International Law Vol. 58, 1964, at 143 pp. 138-151.
98. See above footnote No. 81.



state practice. For example the Anglo-Egyptian treaty on Sudan, granted self-determination to the Sudanese people.<sup>99</sup> Again the France-Algerian Treaty of Evian 1962, though concluded with dependent territory, had a character of international treaty and was regarded as such by the party. It dealt with self-determination for Algeria with the view to creating new state.<sup>100</sup> It must be added that the U.N. Charter is a treaty to which many states are party. By ratifying the Charter states have undertaken under Article 1 and 55 to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of the people. Under Art. 56 all members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Art. 55.

In the above circumstances, it is possible to state that the weight of opinion and authorities for regarding self-determination as a legal principle have increased.

The second phase of the disagreement between the capital importing and capital exporting countries started, when the Commission on Human Rights decided in the third committee of the General Assembly Ninth Session to include an article on the right of self-determination to read:

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99. U.N.T.S. Vol. 161 p. 157 Agreement between Egypt and Great Britain concerning self government and self-determination for the Sudan.

100. American Journal of International Law Vol. 56 1962 p. 116.

"The right of peoples to self-determination also includes permanent sovereignty over natural resources. In no case may a people be deprived of its own means of subsistence on the grounds of rights that may be claimed by other states".<sup>101</sup>

The above proposition was criticised by industrial nations as being imprecise and also containing threats likely to impede international economic cooperation.<sup>102</sup>

After lengthy exchanges of views by both parties, the Committee decided to appoint a Working Party composed of various representatives to revise the text of the above Art. 1. It was significant that the Working Party was made up mainly of representatives from the developing countries.<sup>103</sup> However, the Working Party attempted to reconcile the opposing views, and reported to the Committee recommending a modification of the previous text of Art. 1. In the new operative paragraph, the principle of permanent sovereignty was implicitly maintained, and it read thus:

"the peoples may for their ends freely dispose of their natural resources without prejudice to any obligation arising out of international economic cooperation based on the principle of international law. In no case may a people be deprived of its own means of subsistence."<sup>104</sup>

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101. U.N. Document E.2573 Annex 1 (Commission on Human Rights)

102. Ibid A/3077 (Report of Third Committee) p.24.

103. The Working Party was made up of the following representatives:- Brazil, Costa Rica, El Salvador, Greece, India, Pakistan, Poland, Syria and Venezuela.

104. U.N. Doc. A/C.3/1. 489 Cor. 1 and 2.



The reference to obligations arising out of international economic cooperation, and based on international law, was meant to allay any fears regarding foreign investments in developing countries. Although the latter text won a majority of votes, there was still a feeling that it ought to include an explicit provision against expropriation without adequate compensation.<sup>105</sup> The latter case was dealt with by a Commission, which was set up to study the status of Permanent Sovereignty over Natural Resources.

## II. The Commission on Permanent Sovereignty over Natural Resources

### Introduction

The focal point of the work of the Commission on Permanent Sovereignty was basically whether a nation's sovereign right over its natural resources, is a qualified right i.e. limited by the obligations and responsibilities arising out of international law. In the Commission, one group of states mainly from the Socialist bloc, advocated an unrestricted right to nationalise foreign private property, and in pursuance to this submitted the following proposal to:-

"Confirm the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at the protecting and strengthening of their national sovereignty".

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105. See United States Mission to U.N. Press Release 2301 of November 29th 1955.

Notwithstanding the above proposition, the same bloc further suggested that any paragraph dealing with nationalisation should embody the proposition that:-

(States) unreservedly support measures taken by the people and states to establish or strengthen their sovereignty over natural resources and consider inadmissible acts aimed at obstructing the creation defence and strengthening of that sovereignty.<sup>106</sup>

Delegates from 2 developing countries proposed an amendment, which reflected the same sentiments.<sup>107</sup> Another group of states, mainly from the capital exporting countries, argued that there should be restrictions on the exercise of sovereignty. After lengthy arguments and exchanges of views, the capital exporting countries won the exclusion of the paragraph beginning "unreservedly supports" on the ground that it upset the balance delicately struck in the Ninth Commission's text between sovereign rights and obligations.<sup>108</sup> Accordingly operative paragraph 4 of the Resolution provides, in the event of nationalisation, for payment of appropriate compensation.

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106. U.N. Doc. A/AC.97 L.2 and Rev. 1. The Soviet delegate opposed Chilean draft on the ground that it did not contain an inalienable right of the people to nationalize and expropriate property in a general interest. See U.N. Doc. A/AC.97.SR.32 pp. 7-8.

107. United Arab Republic and Afganistan felt that the Resolution lacked factual data on the method of indigenous participation and financing of exploitation of natural resources - U.N. Doc. A/AC.97 L.4.

108. See above footnote 104.



Despite the defeat of the Soviet proposal on (the issue of) nationalisation the United Nations (Study Group) Commission produced other proposals.<sup>109</sup> The United Nations General Assembly also commented on many Resolutions.<sup>110</sup> Of all the Resolutions perhaps the most important, from a legal point of view, was Res. 1803 (XVII), usually referred to as the Declaration on Permanent Sovereignty Over Natural Resources. It was adopted in the form of eight principles, which can be analysed as follows:

A. Concept

1. The rights of States to control and utilise natural resources.

In paragraph 1 of the Resolution it is stated that the right of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of the national development and well-being of the people concerned.<sup>111</sup>

In this respect, the declaration emphasizes the importance of natural resources in the life of every state; and their role in the development of economic stability and adequate living standards for the citizens of each State.

109. U.N. Doc. A/AC.97/5/Rev. 2, U.N. Docs. E.5170 and A/8058. (The resolutions deal on the Status of Permanent Sovereignty over Natural Resources).

110. Resolutions 626 (VIII) of 21 December 1952; 1515 (XV) of 15th December 1960; 1803 (XVII) of 14th December 1962; 2158 (XXI) of 12th Nov. 1966; 2356 (XXIII) of 19th Nov. 1968; 2692 (XXV) of 11th Nov. 1970; 3016 of 18th Dec. 1972; 3167 (XXVIII) of 17th Dec. 1973; 3171 (XXVIII) of 5th Feb. 1974 and 3201 (S-VII).

111. G.A. Res. 1803 XVII paragraph 1.

## 2. Respect for State rights

The declaration similarly stresses, in paragraph 5, that the beneficial and free exercise of sovereignty over natural resources must be furthered by the mutual respect of states based on their sovereignty.<sup>112</sup> This presupposes that the sovereign rights of states over their natural resources will be enjoyed equally by all, consistent with the general principles of international law. In this context, legal equality in the exercise of sovereignty over natural resources may be understood to mean equal protection by international law, of the rights of states over natural resources, equal and identical application and interpretation of the respective rules by international courts and tribunals, notwithstanding the factual economic inequalities of states.

It also means that no obligation may be imposed upon sovereign states without their consent, direct or indirect, general or particular, given in advance or ad hoc. The requirement of respect of equal sovereignty in the control of natural resources is supported by Professor Schwarzenberger who maintains that:-

"In a legal system which is composed of more than one independent state and is dominated by an individualistic outlook on the part of its members, equality is the only practical working basis. Only on this footing can a number of sovereign states co-exist in one and the same international society; viewed from this angle equality of states is the corollary of the coexistence of sovereign states."<sup>113</sup>

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112. Ibid, paragraph 5.

113. Prof. Schwarzenberger, International Law, 3rd Ed. Vol. 1 p.125.





On examining the Declaration one finds many interesting stipulations. For example in paragraph 7 the Declaration states that violation of the right of peoples and nations over their natural resources is contrary to the spirit of the United Nations Charter and hinders the development of international cooperation.<sup>114</sup>

The linking of the observance of the principles of the Declaration to that of the Charter of the United Nations indicates its importance to the members of the international community and the world at large. In that respect the disregard of states sovereign right over their natural resources is not only contrary to the U.N. Charter but also a violation of the principles of international law, and peaceful co-existence of members of the international community - rich and poor, developed and developing. It is also a non-recognition of the inherent dignity and of the equal and inalienable rights of all members of the family of nations as the foundation of freedom, justice and peace in the world.

#### B. Exercise of the rights

The Declaration not only indicates the aims of the exercise of sovereignty over natural resources, but goes further in suggesting the method of implementing such undertakings. Thus in paragraph 2 it is stated that the exploration, development

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114. G.A. Res. 1803 (XVII) paragraph 7.

and disposition of such resources should be in conformity with the rules and conditions which people and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.<sup>115</sup>

In the first place, the emphasis is on the exploitation of the resources on freely agreed terms by the parties. On the other hand it stresses the duty of states to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state. Since any form of intervention not only violates the spirit and the letter of the Charter of the United Nations Organisation, it also leads to a situation which puts world peace and economic relations in jeopardy.

In this respect the resolution seeks to avoid the sort of intervention that typified American policy in South American States during the latter part of the nineteenth century - a situation which today would undoubtedly be treated as contrary to the spirit and the principles of the Charter and hindering the development of international economic co-operation and maintenance of world peace.<sup>116</sup>

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115. Ibid, paragraph 2.

116. Umozurike op. cit. p. 209 (note 93).



## 2. The taking of private property for valid reasons.

Concerning the same issue of implementation of the principles of sovereignty over natural resources, the early part of paragraph 4 states that nationalization and expropriation shall be based on grounds or reasons of public utility, security or national interest which are recognised as overriding purely individual or private interests, both domestic and foreign.

In the above case, the Declaration advocates that state takeover of private property should not be embarked upon arbitrarily, but for valid reasons of public purposes, or the security of the nation, or national interest. Before examining the prerequisites for state taking of private property, as enumerated by the Declaration, it should be observed that the Declaration has extended the motive for state takeover of private property beyond what used to be the orthodox limitation i.e. public utility.

### (1) Public Purposes

This principle is defined in section 1 above, which deals with the concept of the resolution. The salient point in this case is that the state taking of private property should not be discriminatory, although it may be for the well-being of the citizens of states concerned. Under contemporary international law, the arbitrary or discriminatory taking of private property is unlawful. This issue has been referred

to in various judicial decisions.<sup>117</sup> For example in the Oscar Chan Case the Permanent Court of International Justice said that:

"the form of discrimination which is forbidden is therefore discrimination based on nationality, and involving different treatment by reasons of their nationality, as between persons belonging to different groups".<sup>118</sup>

Unlawful discrimination includes both legal and de facto measures which have the effect of undermining equality in law or in fact between nationals and foreigners. It is obviously impossible to speak of equality in law, whenever the law though in general terms, is interpreted or applied in a manner calculated either to favour or to injure one particular social group as compared with others.

Another case of unlawful expropriation is when it is carried out in contravention of a treaty. On the question of relevance of the purpose of expropriation to question of international responsibility, it has been recognised that expropriation is legitimate for reasons of public utility.<sup>119</sup>

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117. P.C.I.J. Series A/B No. 63 1934 p.87. See also Art. 5 of the Draft Convention on the Responsibility of States for Injuries Done in its Territory to the Person or Property of Foreigners. A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

118. P.C.I.J. Series A/B No. 63.

119. The Permanent Court of International Justice in Polish Upper Silesia (Merits) Case took the position that expropriation for reasons of public utility, judicial and similar reasons was lawful, P.C.I.J. Series A No. 7 p. 22. See Prof. G. White, Nationalisation of Foreign Property 1961 p.5.



In the Goldenberg arbitration public utility was mentioned as one necessary element of legal expropriation.<sup>120</sup> It follows therefore that expropriation other than for public utility could be an unlawful measure. Illegality thus arises from discrimination.

(ii) Security

The unequal distribution of natural resources on earth, especially mineral resources, has in the history of man led to economic inequality, wars of conquest, and colonisation. Although the Declaration does not specify security, one may think in terms of military security and economic stability. The importance of security in the life of a nation is to avoid intervention in its affairs whether in the form of military operations or economic embargo.

The importance of minerals in national security has made many countries intensify the control of this particular natural resource even in the war and peace time.<sup>121</sup> It is only when all the countries feel secure that real world peace will emerge.<sup>122</sup> The importance of national security in terms of production of resources can be seen from the fact that metals of all kinds are

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120. 2 U.N. R.I.A.A. 1928, p.909.

121. C.K. Leith, World Mineral and World Peace 1931, p. 138.

122. Ibid, p. 147.

consumed in vast amounts during wartime;<sup>123</sup> and the drain of world reserve of mineral fuels is then increased many times in order to keep factories producing at maximum capacity and to propel military ships, planes and other vehicles. In short a country with the most industrial potential is one with the military power, and this is dependent on the amount of natural resources it controls.

In fact the necessity for security has been emphasized in many African laws.<sup>124</sup> For example Art. 99 of the Mining Code of Somali, stipulates that:

"In the event of war duly declared, the Secretary shall have the right of pre-emption of all minerals under any permit, licence, or lease, and all products thereof and shall have the right to take control of the mining operations from the holder for such time as the state of war exists."

Security, in terms of economic stability, gives rise to the desire to attain self-sufficiency. Many countries are already aiming at this, or have partially achieved it.<sup>125</sup>

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123. Leith C.K. The World Iron and Steel Situation in its Bearing on French Occupation of the Ruhr, See Foreign Affairs, Vol. 1 1923, pp. 136-151.

124. Libyan Oil 1954 - 1971 p. 14, published by the Ministry of Petroleum Libya Arab Republic. See also Somali Law No. 77 22nd Nov. 1970 Art. 99.

125. In certain minerals, some countries are self-sufficient, for example oil and gold can be found in abundance in U.S.S.R. Iron ore in France, and Britain is aiming to be self-sufficient in oil in 1980.



## (iii) National Interest

National interests differ just as much as the states themselves. Only states can determine their national interest, any form of taking of foreign property to attain it, which is not discriminatory is within the law. This view was expressed by the arbitrator in the P.W. Shufeldt Case which arose out of a Guatemalan Decree of May 22, 1928 nullifying a concession given in 1922 to Shufeldt, a United States citizen. The Decree whereby the concession was nullified gave the following reasons:

(a) the contract was harmful to national interest

(b) it was within the legislative attribute of that state to disapprove such contracts. The arbitrator, having considered reasons (a) and (b) above, said:

"It is within the competence of the Government of Guatemala to enact any decree they like and for any reasons they felt and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to alien subjects."<sup>126</sup>

In most African state practice, specific land areas of national interest are specified wherein no exploration or prospecting should be carried on.<sup>127</sup> In some cases, a state agent is empowered to take any land for public works regardless of whether a concession is granted on it or not,<sup>128</sup> but this form of taking is always indemnified.

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126. 2 U.N. R.I.A.A. 1079 at p. 1095.

127. National Congolese (Zaire) Mining Legislation No. 1 Statute No. 67-231 11th May 1967. Section IV Art. 46(a) (1) and (2).

128. Tennessee Sierra Leone Mineral Oil Agreement, 21st March, 1962, IV Schedule Art. 29, reads - "notwithstanding the rights conferred on the Lessee, use of land under this lease, the Minister shall have power at any time to require that any area or areas of the leased area which may from time to time be required for villages, new village extensions, water/

C. Limitation on exercise of sovereignty

1. Payment of compensation

The latter part of paragraph 4 states that in cases of taking of private property an appropriate compensation should be made in accordance with the rules in force in that State and in accordance with international law. Obviously the agreement of domestic and international rules on the appropriateness of compensation is the ideal situation, giving rise to no legal controversy. On the other hand, though it is incumbent on the national law to decide the appropriate measure, such measures must be judged in accordance with international practice.

The unresolved issue in this area of international law is what is the adequacy and appropriateness of compensation. As for the form and standard of compensation, there has been a divergence of views concerning the form payment should take. For example the Soviet doctrine maintains that international law does not have a uniform practice or generally recognized rule obligating states to pay compensation to the owners of nationalised property. "Justice demands not compensation to the foreign monopolies but restitution by the Colonialist for the harm they caused to the colonies and their people by prolonged colonial rule".<sup>129</sup> Professor Wortley on the

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water reserves or for any other public purpose shall be excluded from the area of surface operation...

129. Sapozhinkov, *Sovereignty over Natural Resources* - Soviet Yearbook of International Law 1959 p. 23.



other hand, maintained that "a state has as a matter of domestic jurisdiction the power to take property in its control for securing the common good of the state." When it does so, by providing prompt and adequate compensation, no loss will result and no wrong will have been done, even to foreigners; by the *lex situs* at any rate, no international wrong will have been committed, which will give rise to any claim for compensation.<sup>130</sup> Prof. G. White pointed out that the traditional formula of prompt, adequate and effective compensation retains some value as a convenient expression of the desired aims, but it must not be regarded as a technical rule for assessment of compensation.<sup>131</sup> On the same issue Prof. Schwarzenberger takes the view that the difference between the terms "full" and "adequate" compensation is merely one between synonyms.<sup>132</sup> Prof. Bin Cheng states that in certain cases, just compensation falls below full compensation; moreover quantum of compensation for expropriation, however in practice it may be computed, though it must be just, fair, or equitable, need not necessarily be full.<sup>133</sup> Amerasinghe is of the opinion that no clear exposition of the principle behind

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130. Prof. Wortley, *Expropriation in International Law*, 1959 p. 23.

131. Prof. G. White, *op. cit.* p. 243 (note 119).

132. Prof. Schwarzenberger, *Foreign Investment and International Law*, 1969 p. 10.

133. Prof. Bin Cheng, *The Rationale of Compensation for Expropriation*, 44 *Grotius Transaction* 1958-9 pp. 267-294.

the rule of adequate compensation has been given in state practice.<sup>134</sup>

The Mexican government relied on this conflict of principle as is reflected in their note sent to the U.S. Government on expropriation by Mexico of agrarian properties owned by an American citizen.

"there does not exist in international law any principle universally accepted by countries nor by writers of treatises on this subject, that makes obligatory the giving of adequate compensation for expropriation of a general and impersonal character. Nevertheless Mexico admits in obedience to her own laws, that she is indeed under obligation to indemnify in adequate manner, but the doctrine which she maintains on the subject which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws."<sup>135</sup>

The United States of America's note to Mexico countered the Mexican argument as follows:

"The doctrine of equality of treatment, like that of just compensation, is of ancient origin; it appears in many constitutions, bills of right and documents of international validity. The word has invariably referred to equality in lawful rights. There is now announced by your Government the astonishing theory that the treasured and cherished principle of equality designed to protect both human and property rights is to be invoked, not in protection of personal rights and liberties, but a chief ground of depriving and stripping individuals of their conceded rights. It is contended in a word that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived and if no victim is allowed to escape. In the instant case, it is contended that confiscation is so justified. The proposition scarcely requires an answer. In addition it must be observed that the claimants in these expropriation cases did not seek to be creditors of the Mexican government. They were forced into that position by the act of Mexico itself."<sup>136</sup>

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134. Prof. Amerasinghe, *State Responsibility for Injuries done to Aliens*, 1967 p. 148.

135. Mexican Note to U.S. Government, See *American Journal of International Law* Vol. 32, 1938 p. 186.

136. U.S. Government reply *A.J.I.L.* Vol. 32, 1938 p. 193.



It can be seen that before the Declaration on Sovereignty over Natural Resources there were two major legal doctrines relating to the measurement of compensation. One of the doctrines was upheld by the Latin American group of developing countries under the so called 'Calvo doctrine' and another by the industrialised countries of the West. The former group maintained that the question of compensation is governed wholly by the municipal law and the only international law obligation recognised by their government was to give foreign investors equal treatment with nationals, thus where their citizens were not compensated for public taking of their property foreigners have no better chance.<sup>137</sup> On the other hand, the industrialised states uphold the view, that it is an established rule of international law, that acts of expropriation of foreign owned assets place the nationalizing government under obligation to pay adequate and prompt compensation.<sup>138</sup>

The position of the United Nations Conference on Trade and Development on the issue of compensation is uncertain. In the third general principle governing international trade relations, adopted by the Conference, it states that:

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137. The Calvo doctrine on compensation is contained in the Constitution of the following states: Bolivia 1945 Art. 18; Costa Rica 1947 Art. 19 as amended; Ecuador 1946 Art. 177; El Salvador 1950 Art. 19; Guatemala 1956 Art. 59; Honduras 1957 Art. 37; Mexico 1917 Art. 27; Nicaragua 1950 Art. 26, 28; Venezuela 1953 Art. 49.
138. U.N. Doc. A/A.97 SR 30 at 7. See also U.N. Gen. Ass. Rec. 17th Session 2nd Comm. A/C.2/8 R. 835 1962.

**"Every state has the sovereign right freely to dispose of its natural resources in the interest of the economic development and well-being of its people".**

The Conference never mentioned the duty to pay compensation.<sup>139</sup> However the views of both sides were fully represented in the course of debates in the Commission on Sovereignty over Natural Resources. In this context the Declaration of the Principle of Sovereignty over Natural Resources is both significant and relevant as it formulated a compromise between the extremists of both sides. It neither endorsed the claims of the less industrialised states, that compensation is purely a matter of internal discretion, nor the claims for full and prompt compensation usually made by the industrialised nations. It is in this context that the appropriateness of compensation advocated by the Resolution should be accepted.

One learned author supported the new trend towards the appropriate standard, urging the development of Western principles of law regarding protection of property in conjunction with the principles and practice of development aid, since private investment in developing countries is today linked with public aid.<sup>140</sup> This midway approach is also defended by the same author, on the following grounds:- In the first

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139. Final Act, June 1964, U.N. Doc. E/Con.46.L.28, Annex A.

140. Prof. W. Friedman, Social Conflict and Protection of Foreign Investment (Proceedings of American Society of International Law) 1963 p. 127.



instance, it is the only way to minimize the cold war between the underdeveloped countries and developed countries.

Obviously this view has political undertones, but it is strengthened by the present demand for the reorientation and remoulding of international law to cope with the impact of social, economic and political changes. Secondly, he argues that the insistence on full compensation advocated by industrialised nations, which includes the loss of future earnings and similar opportunities, would render the distinction between lawful and unlawful nationalisation meaningless. Since full damages are ordinarily awarded as a compensation for wrongful expropriations, what is the use of such a distinction, if the same standard would apply to both lawful and unlawful measures? He is also of the opinion that the legal consequences of full compensation, with both direct and indirect damages included, would constitute such a heavy burden in cases of long term concessional agreements that national governments would be inhibited from exercising their theoretical freedom of determination in the initiation of economic development policies, which may necessitate the termination of such long-term concessions. The government is in the end left with the choice of either defying international obligations or desisting from the exercise of the powers 'that all the capital-exporting countries claim in their contractual relations with their nationals'. Finally, he maintains that the expected profits

and other lost opportunities are themselves very difficult to estimate and highly speculative under prevailing uncertainties of international economies, which far exceed the economic uncertainties within a given country.<sup>141</sup>

Even the evaluation of direct losses is quite complex. Historic or book costs may be unrealistic, while replacement costs may not meet the desires of either party. The private foreign investor would be unhappy in cases where the development of modern technology made it less expensive to produce the original equipment for the recipient country, and the exchange will leave him (the investor) with less book assets, which would necessitate a parallel reduction on the side of the stockholder's equity. On the other hand, many economic development agreements provide for the government's right to take over all physical assets, at the end of the period of duration of the agreement. It would seem unjust to award the foreign investor the full replacement value of assets which he would lose anyway after a number of years. Even if the government were to takeover the physical assets at the end of a concession, much of the equipment might be so specialised as to render it useless for any other purpose, and it might be uneconomic to transfer other equipment to different uses. Hence the measure of compensation in this respect should depend on the remaining useful life of assets taken.

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141. Ibid, p. 130.



On the other hand, it is maintained that the constitutional provisions of the Calvo countries are not entirely satisfactory, because they provide for unilateral determination of both the occasion and the amount of compensation by an interested party, contrary to the legal principle nemo debet esse iudex in propria causa. The view of the expropriated owner might be disregarded, and no room is made either for a negotiated settlement or settlement by an impartial body; therefore the Calvo clause gives much room for doubts, because the obligation of states to pay compensation for taking foreign owned property cannot be avoided by the provisions of the municipal laws of any state. The primacy of international law obligations in all cases has been authoritatively upheld by the World Court.<sup>142</sup> Similarly the equality or non-discrimination advocated by the contentious Calvo doctrine, though interesting, is debatable, because it may be unacceptable as a defence to breach of an international law duty. This is because the traditional customary international law and state practice uphold payment of adequate and prompt compensation as obligatory, and the quantum of compensation cannot be determined unilaterally by nationalising or expropriating states. However there is a school of thought,

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142. Fees Zones Upper Savoy Case P.C.I.J., Ser. A/B No. 46 p. 167; certain German Interest in Polish Upper Silesia P.C.I.J. Ser. A No. 7 p. 19, 1926; Chorzow Factory Indemnity Case, P.C.I.J., Ser. A No. 7 pp. 33-4.

which maintained that, in the absence of a treaty stipulation freely undertaken by a state, international law does not make payment of compensation obligatory.<sup>143</sup> On the other hand, the traditional and widely accepted view is that the taking of aliens property must generally be accompanied by payment of adequate, prompt and effective compensation.<sup>144</sup> Nevertheless, there are instances, though limited, in which international law allows taking of aliens property without corresponding adequate and prompt compensation, such case includes among other things punishment for crime, the state may revalue or diminish the worth of property by regulation, either for health reasons or other public purposes - the exercise of eminent domain.<sup>145</sup> In the light of the fact that there is no uniform formula among writers on international law, and state practice, regarding the criteria for determining compensation, coupled with the difficulties of evaluation of direct losses, and anticipated profit in long term contractual duration, It is maintained that the standard of appropriate compensation supported by the principle of unjust enrichment, will not only give the arbitrators

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143. S. Friedman, *Expropriation in International Law* 1953 pp. 206-11, Sir John William Fisher, *British Yearbook of International Law*, 1928 Vol. IX p. 28, Cavalgheri *Revue General de Droit International Public* Vol. XXXVIII p. 257, at 296.

144. Prof. Wortley *op. cit.* (noted 130) Chap. VII, Fachiri, *B.Y.I.L.* 1925 Vol. VI pp. 159-71. E.I. Nwogugu, *Legal Problem of Investment in Developing Countries*, 1965, p.22.

145. *Ibid*, *op. cit.* p.2., Rubin, *Private Foreign Investment*, 1956 p. 32.



more initiative for handling such cases according to circumstances, but also may be applied in all cases to ensure equitable treatment for either party in the absence of any other treaty stipulations.

Although the Resolution on sovereignty over natural resources did not spell out the foreign exchange difficulties, involving the payment of compensation to foreign investors, its provisions on appropriateness may apply to the form of payment. However Professor Metzger, in an interesting article on the subject in the Virginia Law Review (Vol. 50, 1963) maintains that there is no international law rule requiring that any money, other than the local currency of a state, whether it is convertible into foreign exchange or not, be paid for the taken property, for the following reasons:

Firstly, he maintains, that articles of the International Monetary Fund provide that member countries may prohibit capital transfer across their borders. Hence the local currency receipts from an expropriation may be refused remittance in foreign exchange, as a capital transfer, unless the expropriating government is under a treaty obligation to act otherwise.

Secondly, he maintains that the legislative history of the Charter of the International Trade Organisation, especially the note to Art. 12, reveals that a member country's obligation to ensure the payment of just compensation to a foreign national is essentially an obligation to make payment in the local currency of that country. Thirdly, he emphasizes that a typical

American treaty of friendship, commerce and navigation generally recognises the right of the other contracting party to prohibit the remittance of the local currency paid as compensation for the property taken under an expropriation measure, under conditions of low exchange resources, if such remittance would diminish the foreign exchange resources needed to secure essential imports into that contracting country.<sup>146</sup>

The rule of compensation proposed by Professor Metzger would complicate the standard of appropriate compensation. Most underdeveloped countries impose exchange controls to cope with their foreign exchange difficulties, and moreover the receipt of local currency would hardly be of any use to a foreign investor, whose expropriated investment was made possible by imported capital. For compensation to be effective, the recipient must, in the words of the United Kingdom Memorial in the Anglo-Iranian Oil Case:-

"... be able to make use of it. He must for instance be able, if he wishes to use it to set up a new enterprise, to replace the one that has been expropriated, or to use it for such other purposes as he wishes. Monetary compensation, which is in blocked currency is not effective because where the person to be compensated is a foreigner, he is not in a position to use it, or to obtain the benefit of it. The compensation therefore must be freely transferable from the country paying it, and so far as the country's restrictions are concerned, convertible into other currencies".<sup>147</sup>

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146. Prof. Metzger, Property in International Law, Virginia Law Review, Vol. 50 1963 p. 601.

147. Memorial of the U.K., I.C.J. Pleadings, Anglo-Iranian Case, 1952, p. 106 paragraph 309.



In support of the above view expressed, Amerasinghe maintains that:

"although the general rule may be that payment must be in convertible currency, it is submitted that there is room for an exception as formulated above, that where investment is possible in the nationalising state, the income from such investment being comparable with income from investment elsewhere, and that income may be remitted abroad, payment may be made in the currency of the nationalising state or in securities."<sup>148</sup>

It seems Professor Metzger does not take into account the prime purposes of the fund as set out in Art. 1 by which the Fund is to be guided in all its decisions, some of which are:

"to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy,"<sup>149</sup> and to promote exchange stability, to maintain orderly exchange arrangements and to avoid competitive exchange depreciation."<sup>150</sup>

Undoubtedly, Professor Metzger would appreciate that his proposition would disrupt the economy of the majority of less developed countries in that, if it were accepted, it would necessitate developing countries printing more money to meet such payments, and thereby jeopardising the economic equilibrium which they might maintain under normal circumstances. It is only necessary that commercial relationship be maintained by

148. Art. 3(III) of the OECD draft convention stipulates that compensation shall be transferable to the extent necessary to make it effective for the national entitled thereto. Prof. Amerasinghe op. cit. p. 162. The Harvard draft of 1961 Art. 10, 12 requires that the payment in the currency or currency readily convertible unless otherwise specified in a contract. See the Draft on A.J.I.L. Vol. 55 1963 p. 553-566-583.

149. International Monetary Fund Agreement Art. 1(III).

150. Ibid, Art. 1(III). See Fawcett B.Y.I.L. Vol. XL 1964 pp. 32-76.

taking into account the difficulties of foreign exchange problems of less industrialised countries - Asia, Africa and Latin America.

The development of natural resources under expropriated concessions is a major contribution to the foreign exchange earnings of the country, since the greater part of the produce is exported. It would seem fair that the greater part of the exports of nationalised industry or enterprises be used to pay the necessary compensation.

In this case the standard of appropriate compensation would mean that if the compensation is paid in local currencies, the affected foreign investor should be allowed to make a capital transfer in a foreign exchange gradually to the extent justified by the earnings of the nationalised industry within the context of the balance of payments needs of that country.

It is obvious that payment in local currency, if not allowed to be transferred, can hardly be considered as appropriate compensation. It could be said that the measure of compensation introduced by the Declaration provides a guide line, which demands further development. It is undeniable that international law and relations can develop in this field through a series of ad hoc compromises<sup>151</sup> out of which, in time, a general body of principle of international economic law may evolve.

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151. Prof. Friedman - Changing Structure of International Law 1963 pp. 360-1.



## 2. Respect for Acquired Rights

The doctrine of acquired rights is recognised by writers,<sup>152</sup> and is often referred to in judicial decisions. The Declaration on Sovereignty over Natural Resources does not ignore it, but is entirely concerned with the application of the principle in cases of state succession.

In the German Settlers in Poland Case, the Permanent Court of International Justice, in ruling against the action of Poland affecting the interest of Germans settled in that territory, the sovereignty over which had passed to Poland by cession after the First World War stated that:

"Even those who contest the existence in international law of general principles of state succession, do not go as far as to maintain that private rights including those acquired from the state as the owner of the property are valid as against a successor state."<sup>153</sup>

The court prefaced this statement by noting that:

"the general question of whether and under what circumstances a state may modify or cancel private rights by its sovereign legislative power requires no consideration here."<sup>154</sup>

With regard to investments made in the colonial period, most of the developing countries contest universal state succession. They claimed, therefore, the right to review

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152. Kaeckubeeck, The Protection of Vested Rights in International Law B.Y.I.L. Vol. XVII p. 1, 1936.

153. P.C.I.J. Series B No. 6, p. 36.

154. Ibid.

economic agreements entered into during their colonial dependency. This agitation was behind the resolution passed in the Human Rights Third Committee. The last sentence, paragraph 3 of the article on Self Determination reads:

"In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by others."<sup>155</sup>

The above contention was not entirely favoured by the delegates of industrialised countries, hence they sought to establish the respect for the acquired rights of colonial investment to be recognised.<sup>156</sup> As the delegates of developing countries argued that rights acquired during the colonial era could be abrogated at the discretion, they based their reasoning on dormant continuing sovereignty in colonial period, and alleged that such agreements were not freely entered into.<sup>157</sup> In the light of this fact, they proposed an amendment to be inserted in preambular paragraph 3 between third and fourth to the effect:

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155. See footnote No. 101.

156. U.N. Doc. A/AC.97/SR.28 p. 3-5.

157. U.N. Gen. Ass. Off. Rec. 17th Sess. 2nd Committee 298 A/C.2/SR.846, 1962. The proposition was made by the delegates from Algeria. It was supported by Ceylon *ibid* 356 (A/C.2/SR.853, 1962), Indonesia *ibid* 341 A/C.2/SR.852, 1962, Syria *ibid* 369 A/C.2/SR.855, Yugoslavia *Ibid* 298 A/C.2/SR.846, 1962.



"that the obligation of international law cannot apply to an alleged right acquired before the accession to full sovereignty of formerly colonized people or countries, and that consequently such alleged acquired right must be subject to review as between two equally sovereign states."<sup>158</sup>

Writers like Friedman shared the same view.<sup>159</sup>

When it was learnt in the Committee on the Permanent Sovereignty, that the International Law Commission was studying the issue of state succession and might deal with the problems of acquired rights, the members of the Permanent Sovereignty Committee modified the difficulty of reaching decision by adopting this proposal,<sup>160</sup> which became the preambular paragraphs 5 and 6 of the Declaration on the Principle of Exercise of Sovereignty over Natural Resources. It reads thus:

"Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State in any respect of the question of rights and obligations of successor states and Governments in respect of property acquired before the succession to complete independence of countries formerly under colonial rule."

The view that colonial agreements require special treatment and that the modification of rights acquired under such agreements should not be subject to rules of compensation is held by many states especially by developing countries and the Communist bloc.<sup>161</sup> The inability of the General Assembly to take a final decision on the issue leaves the validity of the

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158. Ibid A/C.2/L.686 Rev. 2, 1962.

159. S. Friedman op. cit. p. 126.

160. U.N. Doc. A/C.2/L.686 Rev. 2, 1962.

161. See footnote No. 157.

traditional principle debatable. However the reports of the Special Commission on the Law Concerning Acquired Rights show realization of the need to adopt the traditional principle to changed circumstances.<sup>162</sup>

All that can be said is that the Declaration on the Principle of Exercise of Sovereignty Over Natural Resources has set in motion a movement that will enable the contending parties to reach an acceptable compromise on the issue of acquired rights.

D. Regime for importation of foreign capital

1. Authorisation by producing country.

In paragraph 3 the Declaration lays down that in cases where authorisation is granted the capital imported and the earnings on that capital shall be governed by the terms of the agreement between the producing country and the capital investor. The profit derived from the utilisation of such capital must be shared in a way agreed by the parties. Whatever the arrangements, due care must be taken to ensure that there is no impairment, for any reason, of that state's sovereignty over its natural resources.

The above paragraph indicates that exercise of sovereignty over natural resources does not exclude exchange restrictions, or enactments which control the movement of currency, property,

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162. U.N. Doc. Sales 62 V.6 p. 88 (1962).



and services for the purpose of protecting the financial resources of a given country. Such measures *prima facie* constitute an integral part of a state's monetary policy and are therefore considered to be matters of an essentially domestic nature beyond the scope of international regulation. In every case, the importation of such capital is at the discretion of the country concerned.

## 2. Co-operation in exchange of scientific information

The Declaration categorically states in paragraph 6 that international cooperation for the economic development of developing countries, whether in the form of public or private capital investment, exchange of goods and services, technical services, technical assistance or exchange of scientific information, shall be such as to further their independent, national development, and shall be based on respect for their sovereignty over their natural wealth and resources.

The rationale of international economic cooperation in exploitation of natural resources is based on the fact that the resources are unevenly distributed. In reality the unequal distribution of natural resources means that international economic cooperation in this field is inescapable. Even in the 'have countries' many minerals and raw materials are not produced in the quantities required.

The interdependence of nations has grown rapidly with the expansion of the natural resources industry. Cooperation which involves both capital and technically rich and poor but resources owning countries will promote the international division of labour, whereby each party contributes in the area in which it has a comparative advantage. Moreover such cooperation will be intensified as the continuous expansion of industry calls for ever increasing quantities of mineral raw materials, especially from the great unexploited reserves. With advances in technology new sources of minerals are being discovered and thereby promoting further economic cooperation.

The geographic distribution of natural resources is such that certain countries will always be poorly endowed as compared to others. It follows that access to the product of natural resources by the "have not" countries is essential if the highly developed industrialisation of the modern world is to continue. It is in this light that the legal position of capital importing and capital exporting countries on the issue of exploration, distribution and disposal of unevenly distributed and non-renewable natural resources should be appreciated.

### 3. Observance of investment agreements

It is in keeping with the harmonious development of international economic cooperation and the efficient development of the natural resources industry that the Declaration emphasises the importance of investment agreements.



Thus paragraph 8 categorically states that foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith; states and international organizations shall strictly and conscientiously respect the sovereignty of peoples over their natural resources in accordance with the Charter and the principles set forth in the resolution.

Very remarkable is the recognition that private investors have a certain standing in the international judicial system as far as the validity of and observance of investment agreements or contracts or economic development agreements are concerned. Although reference to private persons is not specified, it is implied in several parts of the Declaration; for instance the last paragraph, 4, includes the following phrase

"however upon agreement by sovereign states and other parties".

The other parties could be a state, a corporation, an individual or group of individuals. However the distinctions are evident in Chapter 8 of the Declaration.

The Declaration thus takes an important step towards recognizing certain rights for private persons in the international community, hence the emphasis on private international agreements contributing to the course of economic development of underdeveloped countries, which are to be observed in a similar way as public international instruments.

## **E. Settlement of Disputes**

### **1. Exhaustion of local remedies**

Among other things the resolution embodies methods of settlement of investment disputes. (Methods of settlement of disputes and the law applicable are treated fully in Chapter IV). In this respect it is maintained that in any case where the question of compensation gives rise to controversy, the national jurisdiction of the state taking such measures shall first be exhausted. However upon agreement by the sovereign states and other parties concerned, the settlement of disputes shall be effected through arbitration or international adjudication.

The above proposition is a restatement of the principle of international law concerning the exhaustion of local remedies. This rule was stated in the *Ambatielos Case*; viz. - that the state against which an international action is brought for injuries suffered by private individuals has the right to resist such an action, if the person alleged to have been injured has not exhausted all remedies available to him under municipal law.<sup>163</sup>

One may ask, why the resolution refers to national jurisdiction and not national remedies. Jurisdiction and remedies are not identical or synonymous. It is apparent that this is

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163. *Ambatielos Claim (Greece v. United Kingdom)* Arbitration Commission 6th March, 1956, I.L.R. 1956 pp. 306-334.



the result of bad drafting, and it is not intended to attack the rule that where no remedies exist, there is no duty to exhaust them, because it is possible that in such cases there is still jurisdiction to exhaust even if there are no remedies.

The exhaustion of local remedies is a substantive rule of international law.<sup>164</sup> In fact no international responsibility arises until the claim is rejected by the local courts. There must be a denial of justice committed by the local courts, otherwise international responsibility is non-existent.

The denial of justice may also result either from the refusal of the administrative redress or from extraordinary methods of redress designed to supplement its deficiencies.<sup>165</sup> The clearest statement of this rule has been provided by the European Commission on Human Rights which stated that:

"... recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and efficient means of redressing the wrongs for which on the international plane, the respondent state is alleged to be responsible."<sup>166</sup>

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164. P.C.I.J. Series A/B No. 76 p. 47. See Castor, Local remedies in International Law, 1961 p. 33.

165. P.C.I.J. A/B No. 74 pp. 20-28 (the Phosphates in Morocco Case, in 1938).

166. The Commission was established under the European Convention for the Protection of Human Rights and Fundamental Freedoms in Rome, Nov. 4th, 1950. Art. 26 provides that the Commission may deal with the matter after all domestic remedies ... have been exhausted. Yearbook of European Convention on Human Rights, 1956, pp. 412-440.

It is noticeable that the resolution does not provide an alternative procedure, in cases where local remedies are exhausted without effect. Of course it is the ineffectiveness of local remedies that makes it possible to resort to an international standard of justice. Although the Declaration left the issue of effective remedies in the same weak state of indecision as "appropriate compensation" the international standards of equity and reasonableness are left to the tribunals concerned to deal with in particular cases.

### III. The Legal Significance of the Declaration

#### Introduction

The diversity of Resolutions and their unequal juridical value make it difficult to evaluate their importance as sources of international law. Added to this difficulty is the long standing view held in some quarters that since at San Francisco the General Assembly of the United Nations was denied the power to enact international law, its declarations have only moral value;<sup>167</sup> and as such cannot be sources of legal rights and duties.

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167. Asamoah O; Legal Significance of the Declarations of the General Assembly of the United Nations, 1966, p.2; Sloan; The Binding Force of Recommendations of the General Assembly of the United Nations, B.Y.I.L., Vol. 25, 1948, pp. 6-7; Li-Liang Yuen; The General Assembly and the Progressive Development and Codification of International Law, A.J.I.L., Vol. 42, 1948, pp. 67-68.



More often than not, the decisions of the Assembly as a political Organ are thought of only in terms of their political significance,<sup>168</sup> and the separability of law and politics is maintained. There is also a strong feeling that the actions of states in the Assembly and in other political organs of the U.N. are politically motivated and therefore directed towards advancing national interests, so that legal considerations are submerged.<sup>169</sup> This view has gained such ground that in many cases Resolutions are not implemented.

Equally detracting from the legal value of the declarations are doubts concerning the status of the practice of international organizations as a law-creating process.<sup>170</sup> For example Art. 38 of the Statute of the International Court of Justice, which is regarded by many as defining the sources of the international law, does not contain any reference to the practice of international organisations. This omission has led people to various conclusions as to the binding force of a recommendation of the General Assembly of the United Nations.<sup>171</sup>

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168. Prof. Schwarzenberger, *World Economic Order* 1970 p. 40.

169. *Ibid.*

170. The delegate of Australia, supported by that of New Zealand, argued that rules of international law are formed only through the practice of states and adoption of conventions and that the Assembly resolutions cannot constitute a separate source of international law - U.N. Gen. Ass. Off. Rec. 17th Sess. 6th Committee 120(A/G.6/SR.758). *Ibid* 171-172 (A/C.6/SR.766). They did not appear to deny the probative value of some resolutions, but they overlooked the important fact that Assembly resolutions also constitute the practice of states. Their views are typical of many states, however.

171. F.B. Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, B.Y.I.L. Vol. XXV 1948 p.1.

#### A. Judicial Decisions

The principle of the exercise of sovereignty over natural resources has been relied upon for various reasons by national courts in adjudication of disputes. The value of reference to this principle is that it is a part of what is regarded as state practice and can sometimes be a guide to the interpretation and application of national laws. It has been relied upon as evidence of modern law, or modern practices relating to the right of states to control their natural resources.

Thus the civil Tribunal of Rome in supporting the Iranian Oil nationalisation stated that the Declaration on Permanent Sovereignty over Natural Resources might be regarded, in the context of its timing - less than a month after the passage of the Iranian law - as recognition of the international legitimacy of that law.<sup>172</sup>

The High Court of Tokyo also referred to the same law in an Oil Refining Case, *Anglo Oil v. Idemitsu Kosan Kabushiki Kaisha*.<sup>173</sup> The most recent case was in the Italian court of Syracuse's decision rejecting the claims of the British Petroleum Company to ownership of oil fields nationalised by the Libyan Arab Republic. The Court maintained that such claim must be considered in conjunction with Art. 1 of Libyan Petroleum Law No. 25, of 21st April, 1955, by virtue of which all petroleum

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172. *International Law Report*, Vol. 22, 1955, p. 23 at p. 140.

173. *Ibid*, Vol. 20, 1953, p. 305 at p. 313. See also Ian Brownlie, *Basic Documents of International Law*, 2nd Edition 1972 p. 140.



lying in the subsoil of the national state is deemed to be the property of the Libyan state, and no person can explore or prospect for mining, or produce petroleum, unless authorized by a permit of concession issued under the law.<sup>174</sup> In this case the court recognised the application of a national law in pursuance of the Declaration.

An inference can be drawn from the above decisions that when states and Tribunals are confronted with a point of law concerning the exploitation of natural resources they may take cognisance of the Declaration on the Principles of the Exercise of Sovereignty over Natural Resources. This conclusion is supported by the decision of the Federal Republic of Germany's Superior Court of Hanburgh denying third party attachment of copper sold by the Chilean Copper Corporation. The pronouncement of the Court was as follows:

"In the opinion of this Court the events which led to the expropriation of Smesta are to be considered not in their individual acts but as a whole, the expropriation was namely affected for all practical purposes, without indemnification. It was affected under discriminatory conditions and the legal channels have been closed to the parties concerned. There is a principle of international law which is conformed to in particular by U.N. Resolution (1803 XVII) of 14th December 1962, that every expropriation or nationalisation must provide for a reasonable indemnification."<sup>175</sup>

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174. International Legal Material (I.L.M.) XIII, no. 1, January 1974, p. 113.

175. The German ref. of the case is Docket No. 8004/73; see the English translation in ILM Vol. 12 1973 pp. 275-276.

It is evident that courts have referred to the principle of exercise of sovereignty over natural resources in approving the state takeover of private property in some places. In other cases it has condemned state takeover of private property without compensation, referring to the same principle. In the light of this, it is submitted that because of the conflicting views and conflicting state practice concerning the exercise of sovereignty over natural resources, the principle may represent the only consensus of states as to what the law is on the subject, and as such, it cannot fail to have an influence upon decision makers such as the Courts and Tribunals.

B. State Practice

Declarations of the General Assembly of the United Nations enunciating legal principles, particularly in new areas where the law is only beginning to develop, can and do influence state practice. This is the case with the Declaration on the Principle of Exercise of Sovereignty over Natural Resources which has become a part of the series of factors influencing national policy. For example, after the Declaration, Guatemala carried out nationalisation measures relying, inter alia, upon the unrestricted endorsement by the General Assembly of the United Nations of the right to



dispose natural wealth and resources.<sup>176</sup> The Libyan Arab Republic invoked it as an authority for the legality of transferring the installations of foreign oil marketing companies to its national development corporation. The Libyan decree reads thus:

"Because of the fact that the right of people in controlling their natural resources is an authentic and undisputable right recognised by international law and society and adopted by the United Nations, the revolutionary Government hereby enact law No. 69 of 1970 restricting import and sale of oil products to N.O.C."<sup>177</sup>

Recognition of this principle is also implied in the statement issued on August 2, 1956, by the Governments of France, United Kingdom and the United States of America, regarding the Egyptian Decree of 26 July, 1956, nationalising the Suez Canal Company. Paragraph 2, of this statement reads:

"the (three Governments) do not question the right of Egypt to enjoy and exercise all powers of a fully sovereign and independent nation, including the generally recognised right, under appropriate conditions to nationalise assets, ..."<sup>178</sup>

The Chilean Government also invoked the Declaration on the Principle of Sovereignty over Natural Resources as authority

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176. J.N. Hyde Permanent Sovereignty Over Natural Resources American Journal of International Law 1956, Vol. 50 p. 854, See Prof. G. White op. cit. p. 36.

177. Libyan Oil, 1954-71 (A monograph published by the Ministry of Petroleum, Libyan Arab Republic) p. 14. See also Decree of 7th December, 1971, Art. 1.

178. Parliamentary Paper Vol. XLI 1955-6 p. 363. See also the Suez Canal Conference (Selected Documents) 1956 Egypt No. 1, Prof. White op. cit. p. 36 (note 118).

for the legality of its nationalisation of the Copper Companies operating in Chile, the major interests in which were held by United States companies. The Chilean government categorically stated that:

..."the International Community has acknowledged, particularly the United Nations in its Declaration No. 1803 (XVII), the inalienable right of each State to dispose freely of its natural resources, pursuant to its national interest, and the respect for economic independence of States. This goal is attained through the nationalisation of the major copper mining companies..."<sup>179</sup>

The following countries have also taken over foreign property invoking the same principle of exercise of sovereignty over natural resources: Zaire,<sup>180</sup> Zambia,<sup>181</sup> Tanzania,<sup>182</sup> Algeria,<sup>183</sup> Indonesia,<sup>184</sup> Cuba<sup>185</sup> and many other African

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179. Decree Concerning Excess Profit of Copper Companies 28th September 1971 see I.L.M. Vol. 10 Current Document pp. 1235-1238.

180. Ordinance No. 66-343, popularly known as Bakajika Law.

181. On the 11th August, 1969, the Zambian Government announced the Government takeover of copper mines, See "Towards Complete Independence", Address by President Kaunda, to UNIP Council held at Matero Hall, 11th August, 1969, in Lusaka.

182. Tanzania Nationalisation is discussed in detail in the East African Law Journal Vol. 3 1967, in Article by Bradley, pp.149-176.

183. Algeria nationalised the assets of Sehr Company on 24th February 1971 - Ordinance 71-8. On the same date the property of another firm (Sethra) was nationalised - Ordinance 71-10.

184. Netherlands Law Review 1958 p. 227.

185. Cuba Nationalization Decree, See American Journal of International Law Vol. 55, 1961, p. 822.



countries.<sup>186</sup> The fact that the Declaration of Principles of Exercise of Sovereignty Over Natural Resources was adopted by a majority of members of the family of nations which reflected a large degree of consensus - 82 voted for, 2 votes against, with 12 abstentions. This is a testimony to common beliefs and convictions.

It is not so much its character as a recommendation, which determines its binding nature, as the quantity, quality and intensity of community support behind it. The Declaration on the Principle of the Exercise of Sovereignty over Natural Resources has also been recognized by U.N.C.T.A.D.,<sup>187</sup> and the Organisation of African Unity (O.A.U.). All this evidence indicates that the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources has influenced state practice thereby leading to the development of international law.

#### C. The Views of Writers

The purely advisory character of the General Assembly of the United Nations, and, a fortiori, the Economic and Social Council as one of its subsidiary organs, has influenced one

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186. Nationalisation full or partial has been carried out in the following African states:- For example Nigerian Military Government Decree 1971, No. 9 Suppl. to Official Gazette extraordinary No. 15, Vol. 58, 31st March 1971 Part A. See also Art. A of the Agreement between the Government of Sierra Leone and Sierra Leone Selection Trust. The agreement is contained in extraordinary Gazette Vol. C.1, No. 79, of 6th Nov. 1970, p.4.

187. See footnote 105.

UNCTAD Final Act and Reports 1964 General Principle III p.10.

school of thought to deny the legal significance of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources. This school of thought maintains that the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources is no more than 'para legal ideology of power economics' and discredits the capital importing countries view that it is in a legally binding form. It is also suggested that this principle neither affects the law, nor changes it.<sup>188</sup> According to this school of thought, the Declaration merely enumerates the rights of states, which are not qualified by any limitation of international responsibility.<sup>189</sup>

There is no doubt that this school of thought relies on the traditional concept of the role of the General Assembly of the United Nations as an advisory body whose Declarations have only moral and political value. The traditional concept has been discussed in the introduction to this section and it was observed that this school of thought takes little cognizance of state practice and judicial decisions, which can add legal status to a particular declaration of the General Assembly of the United Nations. It also ignores the difficulties of international economic cooperation in an expanding world, as

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188. Lord Shawcross, *Some Problems of Nationalisation in International Law*, International Bar Association, Monaco, 1954, p.14 at 21.

189. P.J. Okeefe, *Journal of World Trade Law*, Vol. 8, 1974, p. 244.



new nations emerge to statehood; which are provided for in the Declaration on the Principles of the Exercise of Sovereignty over Natural Resources; and also the rights and obligations this principle imposes on the members of the U.N.

Above all this school of thought ignores Art. 55(a) and (b) of the Charter of the United Nations, under which the General Assembly undertakes to promote:

- i. higher standards of living, full employment and conditions of economic and social progress and development;
- ii. solutions of international economic, social, health and related problems and international cultural and educational cooperation.

In this respect the legal significance of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources will not only be supported in judicial decisions and state practice, but also in interpretation of the Charter of the United Nations concerning the discharge of the function imposed on the General Assembly by Art. 55(a) and (b) of the Charter of the United Nations.

Another school of thought, recognises the traditional concept of General Assembly Resolutions but is influenced by the complexities of politics and economics of the expanding world and the role of the United Nations General Assembly in

promoting international economic cooperation. Hence, in their view, this particular declaration does reflect a wide spread recognition of a state's sovereign right to nationalise property within its borders.<sup>190</sup> On the same point, it is maintained that any particular declaration of the United Nations General Assembly, which is approved by the big powers has a moral and political motivation force which makes it more effective than a mere legal norm: hence there is no reason to attach too much weight to the fact that the General Assembly of the United Nations cannot go beyond recommendation.<sup>191</sup>

There is also a strong contention by the Second group that a particular declaration has legal effect only in the sense that it constitutes a subsidiary means for determination of rules of law capable of being used by an international court. It may not be itself a source of law, its value as a means of determining rules of law depends upon the degree of objectivity

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190. Prof. G. White op. cit. pp. 35-36, See Gess. *Permanent Sovereignty Over Natural Resources*, ICQL 1964 p. 398. Hyde, *Permanent Sovereignty Over Natural Resources*, AJIL Vol. 50, 1956, p. 867. Banjere, *The Concept of Permanent Sovereignty*, Indian Journal of International Law, Vol. 8, 1968, p. 515, Sapozhnikov, *Sovereignty Over Natural Resources*, Soviet Yearbook of International Law, 1964-5, p. 94. Mugharaby, *Permanent Sovereignty over Oil Resources*, 1965 p. 16, Prof. Carlston, *Universality of International Law in Harvard Law Journal* Vol. 8, 1962, pp. 78-81, Prof. Feliciano, *Legal Problems of International Business* Recueil des Cours 118, 1966, 11 p. 248.

191. Prof. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", BYIL Vol. XXXII, 1955-56, p. 110.



surrounding the circumstances in which it is adopted. In particular it depends upon the extent to which it can be regarded as an expression of judicial conscience of humanity as a whole.<sup>192</sup>

When the nature of the concept of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources is examined, an important point that emerges is that the Assembly has not regarded its limitation to making of recommendations as excluding it from making more formal statement or reaffirming legal principles. For instance one may say that the importance of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources lies not so much in its political or moral value and long process of evolution, but in the achievement of consensus on the principles governing the respective rights of capital exporting countries and capital importing countries in areas where these were particularly disputed:- the binding quality of foreign investment agreements between states and foreign private concerns or parties and state takeovers of private property, compensation for the act of taking, the standard of compensation and the resolution of disputes arising from the question of compensation. Despite the conflicting views, the principle

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192. Elias, Modern Source of International Law - Essays in Honour of Philip Jessup (Prof. W.R. Friedman Ed.), 1972 p. 34.

adopted for the exercise of sovereignty over natural resources is a useful one in that it puts the relevant considerations into perspective - an approach which will promote international economic cooperation.

### EVALUATIONS

The Declaration on the Principle of the Exercise of Sovereignty over Natural Resources proclaims the right of peoples and nations to permanent sovereignty over their natural resources including their inalienable right freely to dispose of them.

It points the way to furthering the free and beneficial exercise of the right, and proclaims policies which will guide its exercise - the state has the right to control natural resources, but must not exercise this right in such manner as to constitute an abuse of it. It must exercise it in good faith, and with sense of responsibility so as to have bone fide reasons for what it does, and must abstain from discriminatory acts likely to constitute a breach of law.

ii. It acknowledges prudently the right of peoples and nations to determine the conditions for exploitation, development and disposition of natural resources including the method of importation of foreign capital.

iii. The exercise of sovereignty over natural resources is opposed to violation of the rights of nations to control their natural resources, because such violation is contrary to the spirit of the U.N. Charter and hinders international economic co-operation and the maintenance of international peace.



iv. It emphasizes the right of states to control their natural resources based on the sovereign equality and self-determination of the state, due care being taken not to let investment agreements or international economic cooperation impair the sovereignty of states over their natural resources.

v. Respect for the economic independence of states and the need to promote the economic development of developing countries are considered to be the basis of policies which are conducive to international economic cooperation.

vi. The declaration states grounds for nationalisation beyond the reasons advocated by the traditional concepts. Thus the traditional view is that nationalisation must be for public utility, but the declaration adds to this - for national security and national interests.

vii. Concerning the issue of compensation neither the orthodox view that it must be effective prompt and adequate nor the claim of developing countries that state takeover is entirely a matter of national discretion, with no duties attached, is supported by the Declaration. It rather suggests that compensation should be appropriate thereby leaving the issue to negotiation.

viii. In stipulating the law that will govern capital importation and earnings thereon, equal emphasis is given to agreement between the parties, to national legislation and to international law. In this case the Declaration appears to have abandoned the traditional view that international law regulates only agreements between sovereign states.

ix. On the question of acquired rights, the Declaration indicates that the newly independent nations intent to moderate the rigour of the principle of acquired rights but they do not want to abrogate treaties or agreements concluded before independence, but merely to modify the terms of such agreements to an extent acceptable to the parties.

x. The Declaration stipulates a duty to pay compensation and goes further in saying that in cases of settlement of investment disputes concerning the payment of compensation, national remedies shall be exhausted; or where there is an agreement to do so, recourse shall be had to arbitration or international adjudication. It emphasizes that investment agreements freely entered into must be observed in good faith.

xi. Various national courts have referred to the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources in disputes involving states and private concerns.

xii. Many states have invoked the Declaration as authority for the legality of taking foreign private property - in other words, it reflects a widespread state recognition of their rights to take foreign property within state borders on payment of compensation.



It is not maintained that the Declaration is binding per se; rather it is suggested that the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources enumerates the convictions of states over the issues of exploitation of natural resources. On final evaluation, one finds that the issue of the exercise of sovereignty over natural resources is not entirely related to nationalisation and compensation, but also to international economic cooperation between countries at various states of their development. However, the probative value of the Declaration, as a legal principle supported by a large cross section of the world community, will be evident when we later look at the African state practice, which is the subject of the remainder of this study.

### CHAPTER III

## REGIME FOR DEVELOPMENT AND EXPLOITATION OF NATURAL RESOURCES

### Introduction

The previous Chapter dealt with the different views on the legal significance of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources. In order to test the validity of this principle, it is necessary to examine state practice as regards its implementation. In that case it is intended to examine how African States have recognised the principle in exercising their sovereignty over natural resources.

This Chapter will thus deal with various regulations by which foreign citizens or enterprises are allowed to develop and exploit the natural resources in Africa.

### I. Forms of Regulation

#### A. Statutory

The rights and obligations of foreign citizens or foreign enterprises to exploit natural resources are regulated in two ways:

First, the conditions of the contract are laid down by statute, The law thus determines in advance the framework of the contractual relationship between the state and the licensee. Also the terms and the conditions of operation in the natural resources industry are prescribed. This system is usually followed by countries whose natural resources industries are



developed, such as Algeria,<sup>193</sup> Libya,<sup>194</sup> Nigeria,<sup>195</sup> Zambia<sup>196</sup> and Zaire.<sup>197</sup> Under this system resources are effectively controlled. It also shows the importance of these natural resources to the economic development of the countries. Above all when the terms of the contract are prescribed in advance, the licensee knows his rights and obligations, and there is thus a known limit to further negotiations between the host country and the potential licensee.

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193. Petroleum operations in Algeria are regulated by a comprehensive body of legislation consisting of Ordinances, Decrees, Orders, Model Concessions and Administrative Instructions. Of primary importance are: Ordinance No. 71-22 of 12th April, 1971, which specifies the conditions under which foreign companies exercise their activities in the exploration and exploitation of liquid hydrocarbons - Decree No. 61-1045, of Sept. 16th, 1961, as amended by Decree No. 71-100, April 17th 1971, which established a model convention of concession of liquid gaseous hydrocarbon deposits.
194. Mining operations in Libya are regulated by the Mineral Law 1953, Petroleum Law No. 24, as amended by Law 17, 1970, Law No. 30, 1971, Law No. 32, 1971, and the Decree of 20th Nov. 1965 for petroleum exploitation. There is now a model concession agreement for the exploitation of Petroleum Resources in the Republic. See Selected Documents in International Petroleum Industry 1966 p. 184.
195. In Nigeria there are also series of regulations, but the outstanding ones are Mineral Ordinance, 1946, as amended by the Quarries Decree of 1969, No. 26. Petroleum Operations are regulated by Decree No. 51, 1969 - drilling and production. Equally significant is Profit Tax, 1959, as amended in 1967.
196. The Mines and Mineral Act No. 46 of 1969 (in force 1st Jan. 1970) is the major act in force in Zambia. Equally significant is the Tax Act of 1970.
197. After the independence of the Congo Republic - now Zaire, the Government repealed the Belgian Law of 1937 with the following:  
 La Legislation Miniere National Congolaise Tom I-101, Miniere National Ordinance Loi, No. 67-231 du 11 Mai 1967. Legislation general sur les Mines et Hydrocarbures Tom II, Les Reglement Miniere Ordinance No. 67-416 du 23rd Septembre 1967.

## B. Contractual

The second method whereby foreign enterprises are allowed to work natural resources is through ordinary contracts. By this method the terms and conditions agreed by the parties on negotiation are embodied in a contract.<sup>198</sup> This is peculiar to countries which previously had no mining laws. However recent developments have resulted in all independent African states promulgating laws<sup>199</sup> of one kind or another concerning

198. E.g. A Prospecting and Mining Exploitation and Refining Agreement was concluded between the Government of Sierra Leone, and Tennessee Sierra Leone Inc. 21st March 1962. The Rights and Obligations of the parties are specified in Four Schedules.  
The Government of the Democratic Republic of Congo signed two agreements on June 8th, 1967 with the British Diamond Distributors Ltd. (The company was represented by Hamilton Bermuda). The contract which was entitled Commercialization of Diamonds, is contained in Mineral Trade Notes Vol. 64 No. 9, 1967, pp.14-19. Arts. 1-7 of the first agreement defined the rights and obligations of the parties. In the second agreement Arts. 1-5 defined the rights and obligations of the parties.  
In may 18th 1972 the Government of Sierra Leone concluded a Refinery Agreement with the following companies:
- The British Petroleum Company Ltd.
  - The Shell Petroleum Company Ltd.
  - The Texaco African Limited
  - Mobul Oil Petroleum Company
  - A.G.I.P. S.P.A.
- Clause 1 Defines the Agreement  
2 Objects of the Refinery Companies  
3. Share holding and Finance.  
Arts. 6-27 dealt with other matters of interest to the parties.

199. Mineral Law of the World Series, U.S. Bureau of Mines, Part IV, deals exclusively with the African continent.



the exploitation of natural resources, e.g. adopting the first method. In promulgating such laws many factors have become important.

## II. Factors influencing mining Legislation

### A. Availability of Natural Resources

Not all African States are endowed with the gifts of nature in the form of mineral resources, such as copper, oil, and diamonds, in commercial quantities but the few countries which do have these resources depend upon them for their economic development. This has led to the promulgation of mining laws, wherein the interests and needs of the state concerning conservation of these natural resources are spelt out.

This enables the state to determine its investment priority; for example in Mauritania priority is given to any investor interested in the following enterprises:

"Mining industries which extract, refine or convert solid, liquid or gaseous mineral substances and their affiliated companies serving the purpose of maintenance, construction or transportation, and companies engaged in oil research..."<sup>200</sup>

The above situation is the case also in other countries.<sup>201</sup>

200. Law No. 61-122. (Details of its provisions are obtainable from the President's Office, Nouakchott).<sup>Development plan 18<sup>th</sup> Oct. 1962</sup>

201. In Kenya the investors that receive priority are those interested in processing food, timber, minerals, textiles, assembly of agricultural machinery - See the First Development Plan 1964-1970, In Madagascar different terms are used: instead of "priority enterprise" the term "approved enterprise" is used. These are enterprises concerned with the development of mines and agriculture. See Ordinance No. 60-624 (essentially a redraft of the Law No. 61-037, 9th October 1961). In Nigeria the term "pioneer industries" is used in referring to investment in development of natural resources - see for example the Development Plan of the Eastern Region, 1962-68, in which the emphasis was on development of oil resources.

Most countries with enormous deposits of natural resources are specific in defining their rights, and the obligations of the licensees.<sup>202</sup> The availability of natural resources influences other aspects of mining legislation such as measures to control environmental pollution.

#### B. Economic needs of the country

Most African States are still formulating their economic objectives. Even when these have been formulated, it is not easy to identify them. In some cases for example, they are embodied in the speeches of Heads of State<sup>203</sup> as when the Algerian Investment Code was presented in July 1963 to the Assembly and Mr. Ben Bella emphasized that:

The Government shall intervene by means of public investments in establishing national or mixed economy companies with the participation of foreign or national capital to secure conditions necessary to the achievement of a Socialist economy, particularly in those sectors of activity which are of vital importance to the national economy. [emphasis added].<sup>204</sup>

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202. When the Mining Laws of any countries with developed mining industries, such as Nigeria, Zambia, Zaire, Algeria and Libya, are compared with those of the Sudan, Gambia, or Malawi, one finds a lot of differences, both in structure, and details. Compare for example The Mining Law of Zambia No. 46, 1969 with the Sudanese Mining Exploration Law No. 25, 1974.
203. President Leo Mba of Gabon in transmitting the text of the Investment Code to the National Assembly, said:  
its main purpose is to maintain the economic and social progress of the nation.  
On national economic policy, see also Nigerian Prime Minister's Speech in Parliament News from Nigeria Ministry of Information, Lagos, April 1st, 1964, p.10.
204. See the text of the speech by President Ben Bella in La Depeche d'Algerie, 12th July, 1963, p.4.



In other cases the economic policies are included in development plans.<sup>205</sup> For example the policy and the development plans of the Ethiopian Government are embodied in the Second Five Years Plan (1962-1967) and are described therein as follows:

"to accelreate the rate of economic growth, by better utilization of available resources, and to increase the productive capacity of the economy, to introduce modern equipment and technology and to raise the skill and productivity of labour, and also to raise the saving and investment potentials of the country".<sup>206</sup>

In some cases, the economic policies are mentioned in the Constitution - for example the Constitution of Niger provides for economic co-ordination among African states without any reference to national objectives. Thus it provides in Arts. 69-70 as follows:

"the Republic of Niger is willing to create with other African States intergovernmental organization of common action of co-ordination and of free co-operation. Such organizations may have as their objectives harmonization of monetary, economic and financial policies."<sup>207</sup>

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205. The development plan of the Ivory Coast, 1963, emphasized that the Government thereby enacted a law with respect to its industrial policy. Its provisions empowered the Government to engage in business through the formation of State Companies - with or without private participation - in order to develop unexploited natural resources. See also Development Plan of the Republic of Chad, 1961, p.9, National Development Plan of Nigeria, 1962-63, Chap. IV, p.23, and Seven years Development Plan of Ghana, 1963-1970, (approved by the Parliament on 16th March, 1964) pp. 2-3.
206. See Ethiopian Development Plan (1962-67). The Government has not limited itself to a period of five years, but has projected planning into a twenty year period, of which the second five year plan forms the first series.
207. See Constitution of the Republic of Niger 8th Nov. 1960 Art. 69-70.

After studying the details of the various speeches of Heads of State and the provisions of development plans, the economic objectives can, in general, be summarized as follows:

- i. Independent control of economic affairs
- ii. Raising standards of living e.g. of income, health and education
- iii. Establishing a fair society.

The mining laws of various African States reflect the above policies, which are discussed in Chapter IV of this thesis.

### III. Legal Control of Resources Exploitation

#### A. Exploration

In the pre-independence period, there were two forms of legal control of operations - (a) prospecting for and (b) mining of natural resources industry.<sup>208</sup> However in post-independence an interested person wishing to exploit natural resources in Africa must undertake a systematic approach, starting with applying for, and obtaining an exploration and prospecting licence and proceeding to an exploitation licence.

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208. The two stages of operation in natural resources industry for which the licence was required under the former British African Territories were prospecting and mining, See Mines Manual, Containing Mineral Ordinance and Ancillary Legislation, Cap. 134, 1748.

In Belgian African Territories, two stages were also in operation - permis special, and permis general, See Code et Lois du Congo Belge, 1954, p. 1455.

In French African Territories, the two stages were permis de recherche and permis d'exploitation. See publication du Bureau d'etudes Geologiques Miniere Coloniales, les Ressources Miniere de la France d'outre Mer, 1935, p. 180.



The licensee must pass through three stages - exploration, prospecting and finally exploitation. The system is designed to enable the state to control every stage of operation.

During exploration, states allow the licensees to engage in only one aspect of the activities viz. to conduct a geophysical survey of the area expected to contain workable deposits. It can be conducted off the coast, on the continental shelf, or on the mainland. Care is taken by states not to grant an exploration licence to a licensee in an area where such work is already in progress. The avoidance of duplication makes systematic checks on the licensees possible.

A limitation is generally imposed not only on the size of the area,<sup>209</sup> but also on the number of exploration permits held by each licensee. This device is used by states to ensure that large areas are not held for long periods of time, and exploration work is confined to a small portion of them, but since it is the aim of each state eventually to have large areas explored and many workable deposits discovered, controls are imposed on the allocation of sites to particular licensees. The restrictions imposed by states do not in any way retard the progress of exploration activities, rather they testify

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209. In Zaire the Research Licence is granted for an area of 5 Kilometres, while in Zambia the exploration licence is granted for 10 square miles. See Mineral Act No. 46, 1969, Part V. 32(1) and (2).

the state's wish to control the exploitation of natural resources by the licensees.

In granting an exploration licence, most states give preference to investors with sufficient capital, technical know-how, and experience in the mining industry, because the efficient development of the natural resources industry cannot progress in the absence of the above factors.<sup>210</sup> Equally important is that each applicant for an exploration permit is required to submit his name and nationality; in the case of corporate body, the registered name must be forwarded to the host government along with the plans of the area for which the licence is sought.<sup>211</sup> Detailed information as regards financial status, technical competence, the shareholders in corporate bodies, and the estimated costs of the exploration operation must be forwarded to the government. This is one of the ways in which states can satisfy themselves that they have given the development of the resources to the most efficient licensee. The above condition for granting licences are not however applicable to state-owned corporations or companies.

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210. e.g. Sudan Mining and Exploration Law 1974, Section 7(e) Revised Mines Manual of Sierra Leone 196, Part III (30).

211. Mineral Act of Zambia, Part IV (18) a-1, 1969, Mines and Quarry Act of Sudan, 1972, II (1) a,b,c,d.



The granting of exploration licences is not automatic. A permit to explore any area can for example, generally be denied to a licensee who has been sentenced to a term of imprisonment for violating mining laws or detained for circulating or trading in mineral products without the authorization of the state, or is incapable of financing such a venture.<sup>212</sup> Evidently in placing such restrictions on licensees, states are exercising unfettered sovereignty over their natural resources.

#### 1. Measures of control

The sovereign right of states over their natural resources is extended to both known and unknown deposits within the jurisdiction of the state. Accordingly no licensee is allowed to work minerals which are not included in the licence.<sup>213</sup> If by accident minerals which are not included in the licence are found in an area where an exploration permit has been granted, such minerals belong to the state. Such provisions reveal states' consciousness of their right to control their natural resources. This does not mean that the applicant (licensee) has no right to apply for the new mineral to be included in his licence; such an application is generally allowed, but not automatically.<sup>214</sup>

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212. Ibid, Part V(31) Mineral Act of Zambia 1969.

213. e.g. See The Agreement to Exploit Titanium-bearing minerals concluded between the Sierra Leone Government and Rutile Company (Sierra Leone Incorporated), Schedule 1(5) of 22nd March, 1972.

214. Mineral Act of Zambia, Part IV 24(1)-(5), 1969.

The state may reserve the mineral for itself or grant a new licence to the applicant for the new mineral. What is important to this issue is that no licensee has the rights to such discoveries; failure to observe this may lead to cancellation of the entire exploration license, or a heavy fine, or even imprisonment.<sup>215</sup>

It is not in keeping with modern African practice to allow exploration licences to continue indefinitely. This is mainly because every state wants to retain freedom to exploit their natural resources at their discretion. Because of this policy, it has generally been made an offence for a licensee to transfer his exploration permit to another licensee without the authorization of the state, or host country.<sup>216</sup>

A variant in some countries is to make a licence initially valid for two years with an option to renew, three times, for a similar period. In this case the renewal is granted only after the licensee has produced a working programme approved by state-designated officials or an appropriate department, such as the Ministry of Mines and Power.<sup>217</sup>

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215. e.g. Mining and Exploration Law of Sudan No. 25, 1974, p. 21.

216. In Zaire, for example, the Minister of State must give his approval before any permit is renewed or granted. See Art. 18 II Vol. II Statute 67-231 of 11th May 1967. See Art. 17 of the same statute.

217. e.g. Nigerian Petroleum Decree, 1969, Sch. 1(3).



Another factor that might influence renewals of the exploration licence is the report on the previous exploration licence or activities. When a licensee has been found negligent in the essential performance of his licence he is denied further exploration permits.<sup>218</sup> This shows that the state is concerned also with the efficient performance by licensees of their duties. Obviously the diversity of approach has one object in view, to control the development of natural resources in keeping with state policy.

When a licence expires and is not renewed, the holder cannot continue his work. At this particular stage, the state usually demands logbooks, plans of works carried out during the exploration activities, information on the geological structure of the area explored.<sup>219</sup> The purpose of seeking this data from the licensee is to enable the state to prepare to take-over such operations if necessary. It is from the information submitted by the licensee that the state knows exactly what the licensee has done, the likely mineral deposits, and the geological structure of the entire area of exploration.

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218. Mineral Act of Zambia Part V(33) on the renewal of exploration licence, the Engineer must be satisfied with the performance of the previous licensee.

219. Mining Code of Somali Law No. 77, 1970, Art. 22, 23, 24, Petroleum Decree of Nigeria, 1969, Sch. 1(2), Sierra Leone Revised Manual Cap. 196, Part II (18).

In keeping with the above provisions, each licensee is often asked to keep half of the Cores, maps and details concerning the mineral composition of the area under the licence for handing over to the state, with other items, immediately the licence expires.<sup>220</sup> Obviously such a provision raises an important issue, which if not settled, may lead to friction between states and licensees. The issue involved, though as yet not recognized by many states, is the apparent difficulty of the licensee who wants to maintain his trade secret, is not willing to hand over all the information required by states without any form of guarantee that his trade secrets will be preserved. To alleviate such fears, almost every report received from any licensee is kept confidential, at least from other competitors,<sup>221</sup> for several years.

The records usually involved are those relating to surface and underground workings topographical and geological assays, bore holes, core logs, and others. It must be emphasized that an exploration licence does not confer on the licensee the right to remove any mineral deposits save for the purpose of having it analysed, determining its value, or conducting

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220. Tennessee-Sierra Leone Mineral Oil Agreement, Second Schedule Clause 11.

221. Ibid, Schedule IV, Clause 48, See note 220 (Tennessee/Sierra Leone).



tests on the bulk of the samples.<sup>222</sup> It may be added that the rigidity with which the state enforces compliance to the terms of exploration licences reveals the degree of state involvement in control over natural resources.

## 2. Rights of licensees

The exercise of sovereignty over natural resources is not an absolute right. There is a limit to the exercise of such a right. This is evident from certain rights conferred on the licensees. More often than not, the licensee is granted the sole right over the area in his permit, to carry out geological surveys or investigations.<sup>223</sup>

By virtue of this right, the licensee can generally use any timber (except protected trees) or water, but should not deprive the villagers of their watering places for their cattle or their lands. The licensee is allowed to set up buildings, sheds, structures, and other engines, derricks, facilities for shipping and living accommodation for himself and his employees, and other installations necessary for the efficient performance of his work.<sup>224</sup>

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222. e.g. Mineral Act of Zambia, Part VI, 40(1).

223. Tennessee-Sierra Leone Mineral Oil Agreement Schedule II (2), Sierra Leone, Rulite Agreement to exploit titanium Schedule 1(3) (see note 21), Nigerian Petroleum Decree No. 51, 1969, Mineral Act of Zambia, Part V, Section 36(1)(2) and (3), Mining Code of Somali No. 77, of 1971 Art. 14.

224. e.g. typical is Tennessee-Sierra Leone Agreement II (3)(6)(7).

In most cases the area allowed to a licensee is specified, so that the exploitation of any additional area by the licensee, without the authorization of the state concerned, constitutes a breach of contract and may subsequently lead to cancellation of the exploration permit.<sup>225</sup> In order to avoid conflicts with the host country, the licensee is better to keep to the terms of exploration licence. Where an applicant-licensee feels that he is not well treated, he can generally appeal to the head of state or other competent body.<sup>226</sup> This provision assures the licensee that sovereignty will not be exercised arbitrarily.

It is not in keeping with African state practice to confiscate plant or machinery of the licensee. Instead the licensee is allowed to remove his equipment and installations from an area where the exploration licence has expired, within a specific time fixed by the state concerned.<sup>227</sup> By extending

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225. Nigerian Petroleum Decree No. 51, 1967 Sch. 1(1), Art. 32 of Vol. II; Zaire Mining Regulation No. 67-416 of 23rd Sept. 1967.

226. In Lesotho, for example, any person who has applied for the grant of mineral rights in terms of Section 6 of the Mineral Rights Act, No. 43, 1967, and is aggrieved by the decision of the principal Chief Ward, can appeal to the King under Section 7(2). In Zambia every appeal must go to a Special Tribunal for that purpose; Mineral Act 46, 1969, Part XV, Section III.

227, e.g. Tennessee-Sierra Leone Oil Agreement Third Schedule Clause 25. National Mining Law of Congo (now Zaire) Vol. 11, Ordinance No. 67-416, 23rd Sept. 1967, Art. 55. Mining Code of Somali Law No. 77, 22nd Nov. 1970, Part 11, Section 1, Art. 14, p. 1486. Tanganyika Principal Legislation Cap. 123, Supp. 58, 1969, Part III, Clause 65.



such a right to the licensee, the exercise of the principle of sovereignty over natural resources has incorporated the protection of an alien's property and acquired rights. If, however, such property is not removed within a specific time,<sup>228</sup> it may be sold by negotiation or auction by order of the state. The net proceeds of such sales, after deduction of any amount the licensee is required to pay to the state, is withheld until the licensee applies for it. After a period of time in which such an amount remains in the custody of the state, if the licensee does not claim it, it will be forfeited.

The proposition that absolute sovereignty exists in the sense of unlimited freedom of action for the state is outdated in African state practice. African states when emphasizing their full right of sovereignty do not have in mind the proposition that their sovereignty is outside the rule of law. They understand sovereignty to mean the right to the fullest independence permissible in controlling their natural resources within the international law.

#### B. Prospecting

The first step to legal control of the activities of companies working natural resources in the pre-independence period was the issuing of prospecting licences.<sup>229</sup> In the

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228. Tennessee-Sierra Leone Oil Agreement, Third Schedule Clause 24.

229. See footnote No. 16.

post-independence period, however, it is the second step of legal control, taking place after the exploration licence has expired. In the period after the expiry of the exploration licence the holder may apply to the state concerned to convert the licence to a prospecting permit,<sup>230</sup> for any area found to be promising. At this stage, the process involves a more profound and detailed, and perhaps more costly, investigation of a limited area to determine the economic value of a given natural resource.

In African state practice the legal control through the issuing of prospecting licences is quite distinct from legal control through exploration licences; though applicants must satisfy similar requirements, such as financial viability, ability to understand the mining laws, being over 21 years of age, and possession of technical competence, which are generally also the pre-conditions for the granting of exploration licences.<sup>231</sup>

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230. Somali Mining Code No. 77 of 1970, Part III, Art. 26, Zambia Mineral Act, 1969, Part IV, 16. In Zambia prospecting comes before exploration act. The change of order does not rule out the three stages procedure of the African system for the granting of a licence to an intending licensee to work natural resources i.e. exploration, prospecting and exploitation. See also Sierra Leone Revised Mines Manual, 196, Part II, Clause 9; Tanganyika Cap. 123, Supp. 58, p. 56; Sudan, Mining and exploration Law, Law Bulletin No. 25, p.40.

231. An application for an exploration or prospecting licence may not be granted to any person who is unable to prove to the government designated officials that he can read and understand the mining code. It can be denied a person under 18 years of age. See Sierra-Leone Revised Mines Manual, Cap. 196, Clause 11(1) and (2) a,b,c,d,e,f,

# 1. Rights of Prospectors under the licence

In prospecting activities the licensees have maximum obligations and minimum rights. Initially the states generally allow the licensee to work natural resources in small quantities, as much as is necessary to test the adequacy and operating effectiveness of the machinery and equipment which the companies propose to use.<sup>232</sup> The licensees have the right to surrender their permits for any reasons that might impede the progress of their work, without incurring any liability, but such surrender must be notified to the host country three months in advance.<sup>233</sup>

As with exploration licences, the holders of prospecting rights are allowed to use the area for which the permit has been granted only in accordance with the terms agreed; where they (licensees) are unable to comply, the permits are cancelled.<sup>234</sup> Prospecting licences are renewable. In some countries licensees are protected in such a way that anybody causing an obstruction to the progress of the licensees' work is punishable by the law.<sup>235</sup> From the above grants and safeguards of the rights of licensees, one may say that States

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232. Mineral Act of Zambia, Part IV 40(1).

233. Tennessee Sierra Leone Agreement Sch. 11, Clause 39.  
Mining Right of Lesotho, No. 43, 1967, Clause 11(2).

234. Zambia Mineral Act, Part V (31) a-g.

235. Nigerian Quarries Decree, No. 26, 1969 Part IV (A)(B)(C).



accept responsibility for controlling any stage of mining activities in order to implement sovereignty over their natural resources.

## 2. Obligations of prospectors under the licence

The cost of prospecting is usually borne by the licensee alone, except in the case of an equity joint venture business operation.<sup>236</sup> The mere fact that the licensee bears the financial cost of prospecting does not, however, mean that he has freedom from control by states. On the contrary a minimum expenditure obligation is imposed on the licensee, i.e. the licensee must, as a matter of obligation, spend a certain amount of money per square mile or kilometre, within a given time; for example the Sierra Leone Tennessee Mineral Oil Agreement stipulates:

"During the period of this licence, or any renewal hereof, the licensee shall spend not less than £25 biennially on its operations ... for each square mile of the licensed area..."<sup>237</sup>

Most likely the idea behind the enforcement of minimum expenditure obligation is to prove that each licensee is expected to be conscientious with his work, and by so doing large areas will be prospected and mineral deposits discovered.

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236. Art. 6 of the Joint Venture Business Operation between Libya Arab Republic and A.G.I.P. of 30th Sept. 1972.

237. The annual minimum expenditure in Zambia is as follows: prospecting licence K.25 per sq. mile. A K.1 is equivalent of .68d or more now or 1.4 U.S. dollar, see Economic Report of Zambia No. 26 p. 13.

Although the minimum expenditure obligation sounds very reasonable from a practical point of view, it is in the view of the writer a clumsy way of exercising the principle of sovereignty over natural resources. It can be an ineffective device of ensuring that prospecting proceeds at an acceptable rate, because returns can be inflated by inclusion of unreasonable overhead charges. Also it is impossible to devise a simple scale which will be equally applicable to all cases. For these reasons it is suggested that the expenditure obligation stipulated in various acts and agreements should either be abolished or be kept at a low level in order not to deter investors who have to undertake the capital risks, and who might at the end of the prospecting period not find mineral deposits in a commercial quantity.

The licensees are not allowed to acquire land other than the piece allotted for their activities. African states find most objectionable foreign ownership or interference with land resources, without due authorisation from the state.<sup>238</sup> Licensees are not allowed to prospect for minerals or any natural resources in town centres, villages, wells, public

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238. Tennessee-Sierra Leone Mineral Oil Agreement, Schedule IV, Clause II - the Lessee shall enter upon and occupy for operations lands subject to the provision of Section 5, 6, and 7 of the Mining Ordinance, Cap. 197, and in accordance with such provisions shall receive benefits including the right to appeal and arbitration.

buildings, places held to be sacred, thoroughfares or aqueducts.<sup>239</sup> Host governments object seriously to stoppage of work during prospecting if caused by either the use of poor equipment or failure to maintain that in use in good order. Accordingly licensees are required to keep all wells and trenches capable of providing mineral resources in good condition.<sup>240</sup> Equally significant is that the licensees are asked to drain wastes and to dispose of them carefully after prospecting activities have come to an end. Apart from that they are required to label for future use or reference by the host state all samples they collect during prospecting.<sup>241</sup> The licensees are expected to hand all the negatives of photographs taken in the areas prospected to

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239. Ibid, Schedule IV, Clause 42(1) a,b,c,d,e,f,g, In some countries it is simply stated that the lessee shall meet the requirements of the State. See Mining and Mineral Exploration of Sudan, No. 25, 1974, p.12, Section 18.

240. Clause 6 Schedule II of the Tennessee-Sierra Leone Mineral Oil Agreement stipulates that the licensee shall, in accordance with the methods and practices, acceptable in mining industry take all steps practicable in order to prevent, except for the purpose of secondary recovery, as authorised by the Minister, the entrance of water through bore holes to petroleum bearing strata.

241. Economic Report of Zambia No. 26, 1970, p. 12-13. 3rd paragraph - No geochemical samples or drilled cores should be disposed of without first offering them to the state. See Sierra Leone Revised Mining Manual (Second Impression) Cap. 196, Section 19, Tanzania Principal Legislation Cap. 23, supp. 58, section 55(b). Sudan Bulletin, No. 25, 1974, p. 33, Schedule III, Tennessee-Sierra Leone Agreement, Section 31 and 32 (a)(b)(c)(d).



the state. Evidently the prospecting regulation confers more rights and less obligations on the states, than the prospectors.

The fact that states demand various materials at different stages of operation is evidence of their effective control of natural resources. Equally interesting is the confidentiality accorded to all materials obtained from the licensee which presupposes that protection of the trade secrets of the licensee is also an element of the exercise of sovereignty over natural resources.

### C. Exploitation

Mining or exploitation of specific minerals is the ultimate objective of the two preceding operations - exploration and prospecting. It has been stated in the previous Chapters that exploration or prospecting licences do not authorise the licensee to engage in actual exploitation of minerals except for specific reasons. Therefore in order to exploit minerals or engage in production in commercial quantities, the holder of exploration and prospecting licences must first apply for a mining lease. It is only when the mining lease is granted that he can engage in production of the mineral resources.

#### 1. Mining Lease

The applicant for a mining lease is usually asked to give the following information:

(a) a detailed account of the exploration and prospecting already carried out.

(b) details of mineral deposits or a comprehensive estimate of the ore reserve in the area where the mining permit is sought.

This information enables states to counter check the previous records submitted by the licensees. It also indicates that the mining lease will be granted to the holder of a prospecting licence who has by himself, or through an agent, carried on bona fide prospecting work in the area now applied for for exploitation by mining.<sup>242</sup> In some cases, the licensee is asked to state whether he can find a market<sup>243</sup> for the mineral. This is because minerals, as a major foreign exchange earner, must be sold or exported.

In granting mining leases some countries specifically define the area, for example in the Sudan, a mining lease cannot be granted for more than 250 square kilometres.<sup>244</sup>

If states reject an application for mining lease it is usually on the following grounds:

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<sup>242</sup>. Mineral Act of Zambia, Part VII, 47(b)(c)(e)(f); Sudan Mining and Mineral Exploration Bulletin No. 25, p. 80 8(1)(2)(3)(4); National Mining of Zaire, Vol. 1, 67-231 of 11th May, 1967, Section III; Sierra Leone Revised Mines Act, Cap. 196, 29(1).

<sup>243</sup>. Somali Law No. 77, 1970, Art. 46(b).

<sup>244</sup>. Bulletin No. 25, p. 8 10(1). In Somali a comprehensive Oil Mining Lease shall not exceed 160 square miles. In exceptional cases the grant can cover an area of 500 square miles. See Art. 64 of the Mining Code, No. 77, 22nd Nov, 1970.

i. the applicant or his agent was, at the date of receipt of his application, already a holder of a license,

ii. it is considered that the intended programme of development and mining operations will not ensure proper conservation and use of mineral resources.

iii. it is found that the applicant cheated during previous activities of exploration and prospecting.<sup>245</sup>

Such a refusal does not in any way indicate disinterestedness on the part of the state in issuing mining leases, it is only evidence of the fact that the licensee is expected to display a good standard of workmanship and a spirit of fairness. Above all it further demonstrates the state's control of every aspect of exploitation of natural resources.

## 2. Working rights and obligations

The holder of mining rights under a licence is allowed to make any necessary excavation of ores or minerals. As under exploration and prospecting licences, the holder of a mining licence is empowered by the virtue of his licence, to construct buildings and other facilities, such as pipelines, telephones, necessary for carrying out his job.<sup>246</sup> If for any reason a state demands for public purposes a piece of land in the area

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<sup>245</sup>. Mineral Act of Zambia, Part VII, 49(1) a,b,e,d,g.

<sup>246</sup>. Mining Right of Lesotho No. 43, Clause 13 (5) (1) and (2); Sierra Leone-Tennessee Mineral Oil Agreement, Schedule IV, Clauses (2)(3)(4)(5)(6-7).



for which a mining licence has been granted, the holder of the mining licence must be compensated.<sup>247</sup>

Where mining leases are contiguous and form a single block, the licensee can amalgamate such permits, provided such amalgamation shall not extend to a different class of permit, or at least, not include a different holder of a mining lease.<sup>248</sup> The holder of a mining lease may transfer his right to third party only with the consent of the state concerned.<sup>249</sup> It is also noticeable that just as states grant rights to licensees, the licensees also incur obligations for the same rights granted to them in the course of production activities.

In the course of applying for a mining lease, the licensee must forward plans of the proposed area for mining, otherwise

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247. The Mining Code of Somali, Annex A, Art. 7(1)(2) reads: **Wherever any land, being the whole or part of the surface of any permit, licence or lease, is required for any public purposes the Secretary shall with the approval of the Council of Secretaries give notice to the holder of the mining right, as from the date specified in such notice, that all prospecting and mining rights in respect of the surface area of the land required shall be deemed terminated; and the holder shall remove from such land, before the date specified in the notice any works, buildings, plant or other property. Under the Sierra Leone-Tennessee Mineral Oil Agreement, the holder of the prospecting right is compensated by asking him to choose the same area of land in a different area - Schedule IV, Clause 9(1). See also Mining Laws of Zaire, Vol. II, 67-416, 23rd Sept. 1967, Art. 97-100.**

248. Somali Law Art. 13(1)(2)(1970).

249. Lesotho Mining Rights Clause 18(1).

his mining lease will not be registered.<sup>250</sup> Should the mining lease or right granted to a licensee interfere with the right of the surface owner, the licensee will have to compensate such owner, however such compensation is never determined in advance.<sup>251</sup>

During production, the licensee is expected to employ any method likely to secure reasonable and uninterrupted rate of output. In mining lease more emphasis is placed on keeping good records such as the following:

1. strata and subsoil through which the well was drilled;
- ii. the casing inserted in any well and an alteration to such casing. Among other things the licensee has to label for period of twelve months characterised samples of mineral worked. Such data can be demanded by states at will, and the licensee must surrender them.<sup>252</sup>

Apart from keeping records the licensees have to send quarterly returns of their activities for the period they are engaged in operation. Such returns, among other things, must include a statement of the depth drilled in each bore hole or well.<sup>253</sup> It is incumbent on the licensee to pay any

250. Ibid, 17(1)(ii).

251. Ibid, 17(i).

252. Tennessee-Sierra Leone Mineral Oil Agreement, Schedule IV Clause 6.

253. Ibid, 47 (a)(b)(c)(d).

dues and other financial obligations the state may rightly impose.<sup>254</sup>

It is obvious that for every stage of operations, the parties have their specific rights and obligations. Therefore it would be wrong to assume that the exercise of the principle of sovereignty over natural resources either leaves states with rights and no obligation or, alternatively, the licensee with only obligations and without rights.

### 3. Duration of Mining Lease

States may grant mining rights for any period of time adequate for developing the mine and amortizing the considerable investment involved, or may refuse to grant such a right, especially if the workable deposits are situated in a restricted area or zone - for example near the border or other strategic areas.<sup>255</sup> The duration of mining leases differs from country to country. In the pre independence period, the idea that mining was a consequent right of landed property necessitated mining rights being granted in perpetuity, as were land rights

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254. Sudan Bulletin No. 25, p.9 13(1); National Mining Law of Congo 67-231, 1967, Section VII.

255. The following areas are often excluded from mining land dedicated to the gods, or set apart for public works, burial grounds, construction areas for public parks, See the Tanganyika/Tanzania Cap. 123, supp. 58, Sect. 14; Sierra Leone Revised Mines Manual Cap. 196, Sect. 7 and 8 (a)(b) ii, 2 iii.



or at least for 99 years.<sup>256</sup> With the growing appreciation of the sovereignty of all states over their natural resources, this concept has been abandoned in post independence legislation. Mining leases or rights are granted for a limited duration of time, with the state retaining the power to abrogate them in the case of prolonged non-operation, serious infractions or non payment of taxes or dues.<sup>257</sup>

In African state practice, the mining lease is granted in some places for a 30 year period in the first instance for land, but for the continental shelf for 40 years, with a provision for renewal for another 40 years. The main idea behind the granting of mining leases for such a short time is the avoidance of monopoly by any licensee. However in all cases an allowance is made for the investor's need to make a profit on his capital investment. In this respect the control by states of their natural resources is also concerned with the welfare of investors.

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256. Mendico Mining Yearbook of Zambia 1970, p.8. This situation was not peculiar to African countries. The same situation prevailed in the Middle East, for example the agreement between the ruler of Qatar and Qatar Petroleum company, the duration of the mining lease or licence was 75 years from 17th may 1935-2010. In Iraq, the agreement between the Iraw Government and the following companies:- Mobil Oil, British Petroleum Company stipulated 75 years duration for the licence from the date of grant. For other facts on the Middle East, See 5th Arab Petroleum Congress 1965, Paper No. 1-19 (A-Z).

257. U.N. Doc. ST/123, 1970, p.50.

#### 4. Safety Measures

The exercise of sovereignty over natural resources is deemed ineffective unless the interests and safety of the workers in the natural resources industry are protected. The life of every person engaged in natural resources enterprises - whether the citizens of the host state, or foreign citizens who control the companies - should be safeguarded. This approach has been widely professed in various African economic development agreements, acts and laws. Clause 40 of the Mineral Oil Agreement between the Government of Sierra Leone and the Tennessee Oil Company stipulates, for example:

"the lessee shall comply with any reasonable instructions from time to time given by the Chief Inspector of Mines in writing for securing the health and the safety of persons employed in or about the leased area..."<sup>258</sup>

It is pertinent that states should care not only for the revenue derived from the industry but also for the life of the entire public involved. It is interesting to observe that, the whole argument in the United Nations General Assembly was directed to the protection of foreign property and the right of states to nationalize foreign property, with little or no attention being directed to safety measures for the workers

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258. Schedule IV, Clause 40, Revised Subsidiary Legislation of Tanzania, Cap. 123, Supp. 58, pp. 38-67; Section 59, Part VII, of Mineral Act of Zambia; Nigerian Petroleum Decree No. 51, 1969, Section 8(1)(ii)(iii) V; China L.1554 3; chief inspector may reject any scheme not geared towards safety measures under all these laws.

engaged in the natural resources industry. This neglect suggests that protection and acquisition of property are worth more than the lives of the people involved in the industry.

However, the imposition of safety measures by African states can be justified in international law under the principle of state responsibility. This required that the state must not only protect its property but also the lives of those who create and develop the property. Again without the safeguarding of the lives of people engaged in the industry, or of the populace where the industry is sited, there may be no conservation, no construction of refineries, no production and consequently no foreign capital where a country depends solely on its natural resources industry for their economic growth. Therefore sovereignty over the natural resources industry must be exercised benevolently.

Accordingly in the post independence period, legislative measures were used to impose safety measures on companies and, in addition, safety measures have necessitated the formulation and enforcement of a safety policy, followed by continuity of interest to ensure that the policy is carried out at all levels throughout the organization of the natural resources industry. In order to safeguard the life of the workers and the inhabitants of the areas where the mining



operation is taking place, states usually require that licensees observe strictly the following rules:<sup>259</sup>

(i) filling and fencing dangerous prospecting works;

(ii) protection of shafts not in use. Some laws even detail such requirements as that on no account should water containing poisonous or injurious solutions used in the treatment of gold or other ores be left without fencing, thus preventing inadvertent access to it. This requirement is further strengthened by asking the licensees to instal a notice board in a suitable place to warn the public of the impending danger, and to maintain the pits in good conditions. It is true that most African states have embarked on safety measures, but more elaborate programmes still need to be developed since the prevention of industrial accidents is essential in the exercise of sovereignty over natural resources.

### 5. Conservation

It is difficult to appreciate the reasons why African states adhere strictly to the principle of conservation of natural resources without understanding the economic effects of ignoring modern conservation methods in the field of renewable and non-renewable natural resources. As the concern of this study is more with non-renewable natural

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259. By Tennessee-Sierra Leone Mineral Oil Agreement, Schedule IV, Section 40-41, 42(a-j) the licensees undertake to avoid all harmful working methods.

resources, such as petroleum, an attempt will be made to explain the reasons why states adhere to conservation policy. Petroleum for example is liable to be exhausted and depleted; when this happens it is difficult, if not impossible, to regain or renew it. Moreover as such non-renewable natural resources are distributed in many areas and not concentrated in one place, continuity of exploration and drilling is necessary in order to ensure the discovery of new resources to compensate for those consumed. All these factors necessitate that all organisations in the various states concerned - administrative, economic, legal, and technical, observe and enforce laws and regulations which guarantee that the best conservation measures are taken in the exploitation of these resources.

Conservation of natural resources is of great importance to all states whether they own, produce, sell or buy the product of the natural resources industry.<sup>260</sup> The object of conservation is to prevent waste. In the pre-independence

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260. Ghana Mines and Mineral Conservation Act, 1969, No. 278; the same regulation was repeated in 21st June, 1967, L.1554 Section 8, Mineral Act of Zambia, Part VII, Section 55(1), 56 and 57(2); Nigerian Petroleum Decree No. 51, 1969, Section 8 II; Tennessee-Sierra Leone Agreement, Schedule IV, Section 42(b). For a detailed work on the conservation of natural resources see the Pro forma approved by OPEC Resolution XVI 90; reproduced in OPEC Bulletin, August, 1968, p.5.

period there was little or no evidence of conservation of non renewable natural resources. This is not to say that there was no attempt at regulation of soil conservation.<sup>261</sup>

In modern African practice, conservation of non renewable natural resources is embarked upon as an effective way of controlling such resources. Accordingly each licensee must abide by the conservation policy and observe rules concerning the following:

(a) Efficient use of reservoir energy and maximum ultimate recovery of hydrocarbons.

This principle has been enforced in most countries by controlling gas, oil and water production, and at the same time by encouraging the location of surface and subsurface production facilities.<sup>262</sup>

(b) Gas control and utilisation. Most states impose an obligation on the licensee to retain as much gas as practicable within the reservoir and use it industrially.

(c) Efficient and competent operations

Basically the responsibility for competent and efficient operations belongs to the companies; for obvious reasons it can be presumed that the companies are interested in competent

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261. Lord Harley, African Survey, 1956 (ed.) p. 1015. See the exhaustive study by S.J. Cookey - "The Concession Policy in French Congo and the British Reaction 1898-1906", in Journal of African History VII, 2, 1966, p. 263-278.

262. These measures are often stipulated in conservation provisions (seen p. 128 note no. 260)



operations. It may not be simple to fulfill these requirements, but they are objectives which states pursue with due respect for economic considerations and control of their natural resources.<sup>263</sup>

There is every reason to believe that the licensees are just as interested in the most efficient use of reservoir energy and maximum conservation of natural resources as is the state which is the owner of the resources concerned. Both parties will benefit from a better organized conservation process, and efficient and competent operations. Perhaps differences may arise in their basic approach - the government may view the development of their resources with a much longer range in mind, than is necessary for the well being of an industrial enterprise. Nevertheless a government policy based on conservation is an essential element of sovereignty, particularly when it is remembered that for one reason or the other - political or economic - access to the natural resources of other countries may at sometime be impossible.

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263. The controversy between the Libyan Arab Republic and the Occidental Oil company furnishes an example of how some African states are pursuing a conservation policy. The Government restricted the production of the Intisans well from 320,000 to 158,000 barrels daily in 1970. The restriction was necessary as the Government thought that the company production was not in keeping with conservation policy. See Petroleum Intelligence Weekly of 25th May 1970.

Construction of refineries

One of the stimuli to the exercise of control over natural resources is the desire of every state to be able to supply themselves with such allied products as refined oil, kerosene, and the like. In the pre-independence period almost all oil (for example) used in Africa was refined abroad or overseas,<sup>264</sup> with the result that local consumption was too dependent on overseas refined products. The reverse is the case in the post-independence period.<sup>265</sup> The availability of refined oil is achieved by imposing an obligation on every licensee to construct a refinery plant within the host country; for example the government of Sudan requires that:

264.	African Countries	<u>Pre independence period</u>	
		Oil Refined	1938-60
	Nigeria	Nil	—
	Kenya	"	"
	Ghana	"	"
	Ivory Coast	"	"
	Libya	"	"
	Sierra Leone	"	"
	Gabon	"	"
265		<u>Post Independence period</u>	
			1971-72
	Nigeria	2,750 tons	" "
	Algeria	2,500 tons	" "
	Ghana	1,000 tons	" "
	Sudan	1,000 tons	" "
	Tunisia	1,000 tons	" "
	Ivory Coast	1,000 tons	" "
	Zaire	700 tons	" "
	Tanzania	680 tons	" "
	Senegal	600 tons	" "
	Gabon	500 tons	" "
	Ethiopia	500 tons	" "
	Sierra Leone	500 tons	" "

Further statistics for the pre independence and post independence periods can be obtained from the Information Service of the British Petroleum Institute, See also a booklet published by the same body, Oil Africa, 1974, p.8.

"A licensee shall construct and maintain the operate a refinery on such terms and conditions as the Council of Ministers may specify."<sup>266</sup>

By following the above policies most states avoid over-dependence on foreign refined products. The scarcity of such products overseas does not affect the some supply adversely. Significantly by having a refinery within the reach of the host country the domestic market is assured of supply in a less competitive manner and at a moderate price. It is not considered sufficient merely to erect a refinery; the licensee is expected to refine as great a quantity as possible for home consumption and at the same time produce gasoline,<sup>267</sup>

In the case of other products, such as diamonds, there is nothing like a refinery requirement, but the licensee is made to weigh the minerals locally, in the host country. For example Art. 2 of the Convention on the Commercialization of Diamonds in the Congo, between the Congo Democratic Republic and the British Diamond Distributors Ltd, contains the following provision:

"Diamonds, purchased by Britmond are to be delivered for its own account to its Kinshasa Office. Before being sent to London the diamonds will be weighed by this office and be subjected to a preliminary classification by quality and provisional pricing..."<sup>268</sup>

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266. Tennessee- Sierra Leone Mineral Oil Agreement, Schedule IV, Section 22(2)(a)(b); See Mining and Exploration Law in Sudan Bulletin No. 25, 1974, Section 12; Nigerian Petroleum Decree No. 51, 1969, Section 3(1).

267. Ibid note 266, p. 128.

268. Diamond Convention of 8th June, 1967.



By controlling every aspect of the production of the natural resources industry the African states are exercising unfettered sovereignty, within the requirements of international law.

#### IV. Limitation on the Right of Licensees

##### A. Right of Pre-emption

There are circumstances which can limit the right of a licensee and intensify the control of natural resources by the State. For example, in the event of a state of war states can automatically acquire the right to all minerals mined under any permit, licence or lease, and the products thereof, and the right to control mining operations for such time as the state of war exists.<sup>269</sup>

Such provisions are stipulated and enforced in the natural resources industry so as to ensure that there is no lack of mineral fuel at times of national disaster such as war.

##### B. Force Majeure

Most natural resources' economic development agreements contain provisions governing their termination otherwise than by effluxion of time. Accordingly most African states apply the legal rule that failure to perform an agreement due to force majeure gives a right to an extension of the term of the licence corresponding to the period of delay caused by such an event.<sup>270</sup>

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269. Mining Code of Somali 1970 Law 77 of 22nd Nov, 1970, Art. 22; Nigerian Petroleum Decree No. 51, 1969, Section 6, Schedule 2(2)(3)(4).

270. Tennessee-Sierra Leone Mineral Oil Agreement, Schedule II, Clause 22(1)(22).

Variations exist between particular licences as regards the definition and effects of force majeure, or other circumstances, whereby the failure of a licensee to perform his part will not be regarded as a breach of the agreement, for example in case of war, act of God, insurrection, riot, civil commotion, strikes, or other labour disputes, storm, tidal wave, flood, lightning, explosion, fire, earthquake and any other happening, foreseen or not, which the licensee could not reasonably prevent or control. A mining licence may not be terminated if the reason why the licensee did not start any activity within a specific period from the date of issue of a licence was due to circumstances beyond his control or has a reasonable excuse for such failure. Usually false information to the host government is enough to justify cancellation of any permit, but where such information was a mistake, not an intention to cheat, the after effect may not affect the licence.<sup>271</sup> The above indicates that the exercise of sovereignty is limited not only by conferring rights to the licensee but also by any forces that are beyond human control.<sup>272</sup>

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271. Zambia Mineral Act No. 46, 1969, Section 91.

272. During the Nigerian/Biafra Civil War various foreign companies were affected. There is no evidence that the Nigerian Government cancelled any licence because of the war. Most of the foreign companies after the war continued with their operations. There is also no evidence that M.P.L.A. Government of Angola confiscated the licence of any foreign company during the civil war with UNITA and other Factions.

### C. Imposition of Penalties on Licensees

There are various ways in which the control of natural resources have been made effective. Perhaps the most striking is the imposition for various reasons, of penalties on the holder of a mining licence.<sup>273</sup> The power to impose penalties comes within the prerogative of states and is used to prevent any act of the licensee that may obstruct a states' control of natural resources, such as illegal prospecting, waste of either crude oil or copper, any fraudulent concealment of information with the aim to obtain registration in the host country.<sup>274</sup>

In the legislation of various countries controlling the natural resources industry, there are various forms of penalties. The penalty depends both on the type of offence committed and the legislation of the country concerned. Some offenders may suffer heavy fine, in the form of case payment,<sup>275</sup>

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273. Somali Mining Law Art. 104 - Any person Convicted of violating mining laws has an option of either paying S.O. 1000 or terms of imprisonment not exceeding six months; or both such fines and imprisonment. See Mining Law of Sudan Bulletin No. 25, 1974, p.40, Clause 11(1) (a)(b)(c)(d). The term of imprisonment is 1 year.
274. Tanganyika (Tanzania) Cap. 123 Supp. 58, Part II, Clause 19, Part III, Clause 40.
275. Libya Law 25 of 1955, Art. 22, emphasized the necessity of effective control and thereby stipulates that:  
 (a) A fine of L.D. 5000 (five thousand Libyan Dinars) may be imposed on any person violating the Petroleum Law.  
 (b)/



or have the option of serving terms of imprisonment no matter for what offence. Licensees also are always in danger of losing their mining rights or licences as a form of penalty.

The penalty imposed on the licensee is a proof that the state does not want inefficient utilisation of natural resources, hence every exercise of state control over the activities of the licensees is motivated by the need for a rational and economic use of resources. Penalties imposed by states on licensees who default can be justified on the ground that international law recognizes the right of every state to control everything within its territory.

#### Conclusion

The above investigation has revealed that African states have adopted many different methods of controlling their natural resources. Though in post-independence African practice there are many factors that have influenced mining legislation, each factor is geared towards giving the state the right of control over natural resources. More specifically

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(b) In cases where the licensee or permit holder causes the loss of crude oil or hydrocarbon matter, he shall be required to pay the value thereof over and above the fine imposed on him.

(c) In addition to the said fine a concession or permit holder who causes damage to the deposits as a result of his non-adherence to the provisions of the Petroleum Law and Regulation issued thereunder or his inapplication of sound oil practices, shall have to indemnify the state for such damage.

See Nigerian Quarries Decree No. 26, 1969, Part IV,

(a)(b)(c) 27, 28 (1)(2)(3)(a)(b)(c)

Art. 104 of Somali Mining Code 1970 stipulates six months imprisonment or S.O. 10,000 fine; however, there is no evidence that anyone has been imprisoned for same.

this control is exercised through the forms of licences to work natural resources - exploration, prospecting and exploitation or mining licences.

The post-independence period has seen the imposition of a duty on licensees to utilise the resources efficiently, to maintain, among other things, an efficient conservation procedure. Refining which was formerly done abroad is now required to be done within the jurisdiction of the host state.

It was the practice under the pre-independence regime to grant a licence to work natural resources to private companies in perpetuity or to give a monopoly of a specific natural resource in one territory or another to a company. If the term was specified in such agreements, it would be from at least 99 years onwards. The present practice in Africa, however, is that the duration of a licence to exploit natural resources should not last for more than 25 years or 30 years in most cases. This is the only way the monopolistic power of the companies can be curbed. Mining rights and working obligations have been specified in such detail in agreements concerning the resources industry that no further evidence is needed to support the conclusion that those countries are now effectively controlling their natural resources, in other words exercising their sovereignty over them.

CHAPTER IVLEGAL CONTROL OF FOREIGN ENTERPRISESIntroduction

The previous Chapter dealt with the legal control of the activities relating to exploitation of natural resources. Apart from the working obligations imposed by the countries on the companies as shown in the previous Chapter there are other forms of control inherent in the use of legal techniques. This type of control applies to enterprises that have been accepted, in other words those enterprises that have fulfilled the requirements of the host country.

It is intended in this Chapter to consider the non-participating control formula, by which states exert control indirectly, and participating formula, by which states involve themselves in the actual operation and organisation of the enterprises. Among aspects discussed will be the law applicable to the operation of the whole transaction and provisions for settlement of disputes.

I. Non-participating Control

By this method, states control different aspects of the companies or the enterprise operation without holding shares in them. The control is mainly exercised through various instruments and other forms of legislation.



### A. Registration

In the pre-independence period foreign firms that worked natural resources were incorporated under the laws of different metropolitan governments. With the growth of consciousness of the need to control foreign exploitation of natural resources, many African states have followed their example and insist on incorporation under the appropriate African law, allowing access to natural resources only to nationals or enterprises registered under it. The extent to which this principle has been implemented is evident in economic development agreements concluded between African states and foreign enterprises.<sup>276</sup> In some African countries, an individual enterprise is expected to establish residence in the country for a certain period of time before he can qualify for economic concession.<sup>277</sup>

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276. Schedule 1(2) of the agreement for prospecting, mining and refining of minerals between the Government of the Republic of Sierra Leone and the Tennessee Company of 22nd March 1962. In this agreement, the Tennessee company, which was previously incorporated under the Law of Delaware, United States of America, agreed to file the necessary documents to register the company under the Sierra Leone Company Act.

277. The Law of Zaïre, Statute No. 62-231 of 11th May, 1967, Art. 6(a)(b) - All corporate entities must be incorporated under Congolese Law and have their registered and administrative offices in the Democratic Republic of the Congo, their object must be confined to the prospecting, exploration, and working of mines, the processing of minerals and associated operations. See also Mineral Act of Zambia No. 40, 1969, Part II, 5 a, (ii).

Where the enterprise engages only in buying or selling the products of the natural resources industry, there is always a demand that such an entrepreneur or dealer should be a banker in the country concerned.<sup>278</sup> This is only because a state wants every operation to come within its jurisdiction. The incorporation of foreign firms in the host countries is not peculiar to African countries; for instance under the constitution of Honduras in 1957 concessions may be granted to individuals or companies organised or incorporated under Honduras law.<sup>279</sup> The same method has been adopted by other countries.<sup>280</sup> In some countries, where foreign enterprises are not permitted, it is used to limit share holding by or the voting rights of foreigners. In Sweden, for instance, a foreign corporation cannot register for exploitation of mineral deposits, nor without special authorization acquire real property. A Swedish partnership

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278. Botswana Precious Stones Act, 1969, Part III (ii) - no person shall buy, deal in or receive by way of barter, pledge or otherwise, either as principal, or agent any rough or uncut precious stones unless he is a banker in Botswana.

279. Constitution of Honduras, 1957, Art.6.

280. Iran Regulation for Mines, 1957, Art. 3, stipulates that any exception to the rule of incorporation in the host state must receive the approval of parliament; See also Foreign Investment Law of, and Regulations of, Far East Countries ECAFE/L.22, p.114, and Turkish Law No. 6309, of 3rd March, 1954, Section 12 and 62. See also Foreign Capital, in Latin America U.N. Publications Sale, 1954, II G. p.11, 90-91; Italian Law No. 6, 11th January, 1957, Art. 2, 29.

in which there is a foreign partner or a company issuing shares is in general considered on the same footing as a corporation, and it does not matter what form of incorporation of foreign enterprise under the law of the host country is adopted.

The major idea behind this policy approach is to enable host governments to control natural resources and also to retain contact with the policy makers of the various enterprises. This also evidences the desire of the host state to have foreign enterprise, their policy makers and their records, physically within their jurisdiction. It can also be a step in the nationalising process aimed at separating the foreign enterprise from its country of origin. This of course may not be the sole reason, for instance in certain countries incorporation of foreign enterprise is required to support total or partial exclusion of foreign capital.

In order to enforce the incorporation procedure, enterprises are required to submit certified documents testifying their legal formation, the powers granted to their officers and the purpose for which they were formed.<sup>281</sup> They will be required to give the address of their registered head offices for the purpose of receiving legal notices. The names and sometimes the addresses, of its directors are also demanded.<sup>282</sup>

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281. Mineral Act of Zambia, Part XIV, Section 100-110.

282. Decree of Supreme Revolutionary Council of Somali No. 3, April, 1971, Part IX, Regulation 51, 52 and 54; Mining Law of Zaire, 11th May, 1967, Chapter III, Art. 22.



The registration procedure has limited the freedom which private enterprises formerly enjoyed under the metropolitan regimes in Africa in controlling the production of their necessary supplies of raw materials. However the registration procedure is not meant to keep foreign enterprises out of the natural resources industry but nor is it intended to give them undue freedom that might jeopardise the interests of the host country. It is a flexible approach whereby the exercise of sovereignty over natural resources will ensure an adequate development of the resources concerned, that supplies go to both have and have not countries, and above all that industrial relations among members of the international community will be fostered.

B. Training and Employment of Indigenous Personnel

There is little or no distinction made by African states between training and employment of local staffs by foreign enterprises. However this aspect of the exercise of sovereign rights over natural resources is concerned with the transfer of technology and also has the objective of promoting indigenous industrial skills. Of course the skills acquired by local citizens from employment by an enterprise established with foreign capital is one of the valuable aspects of foreign

investment. The main tenet of these measures is that investment in human resources is likely to produce a higher return in terms of economic growth than investment in fixed amounts of money, and that such investment is also socially beneficial because it improves individual welfare and earning capacity. Accordingly most countries seek to obtain the maximum benefits of industrialisation by either insisting on employment of a certain percentage of indigenous personnel or requiring the foreign concerns to effect a training programme.<sup>283</sup>

An alternative requirement is sometimes that a minimum percentage of the payroll of an enterprise must be paid to local nationals. An example is Egyptian company law which stipulates that a minimum of 75% of the administrative, technical, clerical and accounting personnel of branches of foreign companies operating in Egypt must be its nationals receiving not less than 65% of total emoluments spent by the branch. In addition Egyptian nationals must constitute 90% of the unskilled labour force and be entitled to 80% of the total wages paid by the companies.<sup>284</sup> These provisions in Egyptian law have the motive of both mobilizing scarce capital for individuals who want to engage in private domestic enterprise, and increasing industrial skills for citizens who have

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283. U.N. Doc. (Sales No. E.68 11 D 2) (1968) p.19.

284. Egyptian Company Law No. 28 of 10th January, 1954.

no other chance of acquiring such skills except when employed by foreign enterprises.

In some other countries it is stipulated in an investment act that any investor who has received approval from the government to work natural resources must of necessity make an arrangement to train nationals in administrative, technical and other capacities.<sup>285</sup> This provision is pertinent because, if the transfer of technology, whether by employment of staff or training of local personnel, is to have a lasting effect in the economy of the host country, the latter must have the necessary educational infrastructure and trained personnel. In this case the transfer of technology is linked to educational research in and the technological capability of the host country.

Where the provision for training or employment of local personnel is not in the form of statute law, it is often embodied in an agreement. For example the agreement between the government of Sierra Leone and the Diamond Selection Trust, Sierra Leone (Inc.) provides that:

"the company shall give preference to the employment of Sierra Leone citizens..."<sup>286</sup>

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285. Ghanaian Act No. 72 of 1963, Art. 6; Uganda Sessional Paper No. 1, 9th June, 1964, Art. 12; Nigerian Federal Military Decree No. 51, 1969, Schedule 1, paragraph 37; Law of Nigeria 69 of 1969, Regulation 26-9.

286. Schedule D 15(1) 6 of the Agreement to exploit Diamonds between the Government of Sierra Leone and Sierra Leone Selection Trust (Diamond Company) of 20th October, 1970. The ratification Act of the same Agreement was published in a Supplement to Sierra Leone Gazette Vol. C1, No. 79 of 6th November, 1970. Training and Employment of local personnel/



It is most important that the foreign enterprise should be willing to provide a comprehensive training for national personnel at all levels where mastering over a specific technology is required. The inclusion of such nationals among top level personnel constitutes a decisive step in that direction.

A provision for training local personnel is emphasized in many investment codes and agreements concluded between African states and foreign concerns probably because the host countries want to alleviate their dependence on foreign technology and managerial staffs. The aim of African states in these measures is effectively to obtain, absorb and diffuse into their economy know-how and managerial capability in appropriate forms. Again, countries at a relatively early stage of development frequently need a combination of management and technical skills that can be supplied only by foreign investors. This arises if countries do not develop their own technology and they may then be obliged to pay excessively high prices to import indispensable goods.

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personnel is often included in the Agreement of Commerce, Friendship and Navigation. The government of United Kingdom of Great Britain concluded such an agreement with the government of the Republic of Cameroon - United Nations Treaty Series, Vol. 539, p. 59. Art. 4  
An agreement of Technical Co-operation between the Government of Israel and Government of Dahomey included similar clause, see U.N.T.S. Vol. 448 p. 59.

The companies and their host governments have found a common language over this issue: for example in Nigeria over £190,000 (N.350,000) was set up under the Gulf Oil Company training fund (Administration) Act,<sup>287</sup> for the purpose of training Nigerians as technicians and craftsmen in the field of engineering science, and administration in the petroleum industry. A similar method was adopted by the Shell B.P. company for the training and recruitment and awards of scholarships to deserving candidates from about 60 schools in the Federation of Nigeria.<sup>288</sup> Obviously external technology and management skills are essential elements of foreign investment.

On the global level the less developed countries have adopted a similar approach.<sup>289</sup> The motive behind the host governments agitation for training and employment of nationals by foreign enterprises is twofold: that employment opportunities for nationals should be provided and safeguarded at higher levels, and also that nationals should be used in order to rise to skilled positions.

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287. Gulf Oil Company Training Fund Act No. 32, of 1964.

288. Nigerian Daily Times, 16th September 1971, p. 24.

289. U.N. Doc. A/AC.97 Rev. 2 pp. 37-39.

All states have laws and administrative procedures restricting and controlling to some extent the entry of personnel.<sup>290</sup> Usually these laws and regulations are not limited to personnel active in the field of exploitation of natural resources, but are special provisions to be found in some economic development agreements and in laws regulating particular natural resources. In more developed states, where foreign investment within their borders is relatively less important, control over the entry of foreign labour is likely to be less specific, and less widespread. The legality of such requirements may be found in international law, since it is another way in which states can assert their sovereignty. In the main such measures do not relate to employment of foreigners or affect company law, but they are effective indirect means for activating the transfer of technology, skills, and participation of local nationals in the ownership of natural resources.

The desire that companies train and employ indigenous personnel reveals that African states are conscious of their stage of underdevelopment and wish for development, which can be accelerated by the investment of foreign capital in their respective territories. However rigidity in the

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290. W. Amaah, *Restrictions of Aliens in Business in Ghana and Kenya*, See *International Lawyer* Vol. 3, 1974, pp. 464-77.



enforcement of training and employment of local personnel can be detrimental to the economic development of a state, especially if the required proportions of nationals to be employed in skilled jobs is so high that sufficient qualified men are not obtainable locally.<sup>291</sup> In that case, the advantages to be derived by the host country depend on the latter's degree of development, the nature of training and employment involved, the extent to which the foreign firm is willing to share its trade secrets and up-to-date technology, and the local capacity for original research and development.

In order that such legislation should stand the test of time, it must be elastic enough to admit exceptions, wherever the employment of foreign personnel is essential for the efficient running of the enterprise. This exception finds expression in some of the agreements already concluded between African countries and foreign companies.

Evidently the employment of local labour and the effective training and advancement of local technical and managerial staff with high productivity is another benefit sought through the exercise of sovereignty over natural

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291. A typical case is the Brazilian Law of 1938, which placed work in oil refining entirely in the hands of nationals and caused immediate disruption of works under construction of Standard Oil of New Jersey in Sao Paulo, see Lewis, *The U.S. and Foreign Investment Problems*, 1948, p. 158.

resources. No one doubts that foreign enterprises can make a major impact on the development of natural resources by their ability not only quantitatively to expand, but also qualitatively to enhance, the productive employment of a country's human and physical resources through training and advancement of skilled labour, and of technical managerial staff.

Nevertheless, legislative rules establishing a maximum percentage for total wages that may be allocated to them can at best serve as general guidelines but are not likely to provide a specific answer to individual situations, and may, if rigidly applied, give rise to grievances on one side or the other which are hard to settle. Even in the long run, a foreign investor will want to maintain some foreign presence as long as he retains financial or other assets in the enterprise and is expected to provide technological support. In these circumstances, the exercise of sovereign rights must be elastic and cater for the needs of all parties.

#### C. Partial Relinquishment of Concession Area

Concessions for exploitation of natural resources in the pre-independence period in Africa were vaguely drawn, conveying for too long a time too great an area, without adequate safeguards of the interests of the host country. As a result of the undefined nature of many licences, many local rulers and chiefs were often in conflict with the foreign companies

with whom the agreements or licences were purported to have been signed. Since the Declaration on the Principles of the Exercise of Sovereignty by the United Nations General Assembly, most African countries have made a determined effort to revise these concessions, and particularly to define them more precisely both as to time and as to area in order to recover some of the rights which ought to have accrued to the host country had the area and duration of licences earlier been defined. For example in the Sudan, the Government stipulates that:

"A lease area shall be 250 square kilometres and shall be rectangular in shape and be bounded by straight lines".<sup>292</sup>

Most of the African States have abolished the granting of mining licences for 99 years or in perpetuity; for example the Zambian Government stipulates that:

"Mining licences shall be valid for a period not exceeding 25 (twenty-five) years in any case".<sup>293</sup>

In the pre-independence period a licensee did not require the company to make any partial relinquishment of concession rights. For example in a diamond agreement between the Crown Agents for the Colonies on behalf of Sir Arnold Wienholt Hodson, Governor of the Colony and Protectorate of Sierra Leone, and

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292. Mining and Exploration Laws in the Sudan Bulletin No. 25 1974 p.8, Clause 10(1).

293. Mineral Act of Zambia Part VII Clause 51(a).



the Consolidated African Selection Trust Limited (a diamond company) on 5th day of October, 1934, it was stipulated that:

"The company has the sole and exclusive right of exploring for, exploiting, producing, taking, disposing of and marketing diamonds throughout the colony..."<sup>294</sup>

In the above provision, there was no specification of the time or duration of the licence, the area of operation i.e. the size or area of land beyond which prospecting and mining could not go.

On the attainment of independence, African countries objected to this type of system of granting licences, on the following grounds:

i. the licence for exploitation of natural resources was granted for too long a time, as well as giving to the companies the monopoly of an entire area, in which case, the mineral deposits might even be exhausted before the termination of the period of concession;

ii. Most of the grants to companies by Metropolitan powers were in perpetuity. A typical situation was that which prevailed in Zambia (then Northern Rhodesia) in a concession between the Paramount Chief Lewanika of Barotse and the British South African Company in 1909.<sup>295</sup> This concession enabled the company to acquire mineral rights over a large

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294. First Schedule paragraph B.

295. C.I.P.E.C. Doc. LEG/8 p.3.

area indefinitely. On the attainment of independence, the new government contested the legality of such grant. At this period the issue was between the government of Zambia and two foreign companies that inherited the right from the former company (the British South African Company) i.e. the Anglo-American and Roan Selection Trust groups.

The companies agreed to surrender all special grants under which no prospecting had taken place since 1964, after discussion with the government of Zambia. They also agreed to surrender some other areas where prospecting for minerals had not been carried out and which were not considered by them to include minable minerals.<sup>296</sup>

The present mining laws and agreements in Africa, unlike the concession of pre-independence period, give economic concessions for a specific area, and with a specific time limit. The long duration of the old concession has been corrected by a partial relinquishment procedure. For example in Nigeria it is emphasized that:

"a lessee is obliged to relinquish half of the area of the lease ten years after the grant of an oil mining lease."<sup>297</sup>

Following the purposes of the above, no lessee can assign his lease to another unless he has the prior consent of the

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296. Ibid, p.4.

297. Petroleum Decree, 1969, Sch. 1, Paragraph 2.

Commissioner of Mines and Power.<sup>298</sup> There are variations in the approach to such partial relinquishment measures among African countries. In certain countries the law stipulates that after 5 years a concessionaire must reduce his concession area to 75% of its original size, after 8 years to 50% of its original size, and after 10 years to 33 $\frac{1}{3}$ % of its original size. However, after 10 years the 33 $\frac{1}{3}$ % retained must not be less than 3,000 square kilometres.<sup>299</sup> In some other countries, the principle of partial relinquishment applies to the search permit but not the concession itself. Under the Saharan Code, for example, the applicant is not granted a concession but only exclusive search permits, (usually called Permit II) valid for five years. This permit can be renewed twice, for maximum periods of five years each. The partial relinquishment procedure applies to renewal of search permits, and during renewal the mining area is reduced by one quarter.<sup>300</sup>

It is worth considering further the practice of partial relinquishment in Africa before an attempt is made to examine the same practice elsewhere. One notable feature is that in most provisions for relinquishment, there is no mention

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298. Ibid

299. e.g. Libyan Law as amended in 1965, Art. 10.

300. Sahara Petroleum Code, 1958, Art. 1-5.



made as to whom the state should give a permit to continue the exploitation work in the relinquished areas. Will the company which has relinquished such an area prefer a competitor to work the area it has relinquished? The question is not so much why a state should ask for relinquishment but how it will use the area, so that the right of the former licensee is protected. One possible solution seems to lead to the reason why the above provision is non-existent in most concessions. It is because most states reallocate the relinquished area to their own national company. The same situation prevails in the case of state take overs of foreign assets. In both cases the most likely recipient of the concession for the relinquished areas is a state company.

If we digress for a moment to examine the developing situation elsewhere, for example in the Middle East,<sup>301</sup> it will be found that since the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources, the partial relinquishment measure has been firmly entrenched

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301. The partial relinquishment measure adopted in Africa applies also in Middle East Models for granting licences. For example, the Iraqi Government entered into negotiations with the oil companies from 20th August, 1958, to 11th October, 1961, relating to relinquishment by the companies of the underdeveloped portion of their concession. See Law No. 80 of 11th December, 1961; See also Economic Development Agreement between the Ruler of Qatar and Shell B.P. Co. Ltd. on 15th January, 1961, Art. 10; and Art. 13 of a similar Agreement between the same Ruler and the Arabian Oil Company, 5th July, 1958. See also Art. 44 of the Economic Development Agreement between the Saudi Arabian Government and Japan Trading Company on December 10th, 1957.

in modern oil or mineral legislation - indicating how various countries are striving to recover some of the concession areas previously granted. In general, the partial relinquishment provision was unknown to the legal regime for exploitation of natural resources in pre-independence period. The mere introduction of such measures and the understanding reached in its application among various countries and foreign companies engaged in exploitation of natural resources is of far reaching importance; it indicates that by regaining the old concession area by measures of partial relinquishment, states are controlling their natural resources, thereby implementing the principle of sovereignty.

#### D. Inspection

Different forms of inspections prevail in the natural resources industry. They are as follows:

- (i) supervision i.e. checking the operational activities of the companies;
- (ii) safety, by this form the inspectors are concerned with examining how various companies implement the states' safety measures regulations;
- (iii) accident, this form of inspection is concerned with investigation of various accidents, deaths or bodily harm that might have occurred in the area where the exploitation of natural resources is taking place. No matter what the form of incident, States appoint inspectors. They may be

high ranking officials from different walks of life - for example the Republic of Sierra Leone stipulates that:

"Any provincial secretary, District Officer, Officers of Mines, Department, Geological Department or survey or land Department may enter upon any land on which mining or prospecting operations are being conducted or which is subject of any lease, right or licence and inspect any prospecting or mining operations or any works in connection therewith."<sup>302</sup>

As has just been pointed out, inspectors carry out various duties, some connected with exploitation of the resources, and others not directly connected, but still falling within the responsibility of states as territorial sovereigns.

#### 1. Supervision of operational activities

It is the responsibility of inspectors to see that the licensee is working the particular mineral for which the licence was granted. They are empowered to make any surveys necessary for the purpose of reporting on any land; observing whether the licensee takes the necessary measures to prevent or reduce soil erosion caused by his operations, fills all pits, removes any tailing or other dumps or heaps caused by his operations.<sup>303</sup>

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302. Sierra Leone Revised Mines Manual, Chapter 196, Clause 83(1); Mining Legislation of Nigeria, 1969, Part II 15(1); Mining Law of Congo (Zaire) Statute 67/231 of 11th May, 1967, Vol. 1, Art. 58.

303. Sierra Leone Revised Mines Manual, Cap. 196, Clause 83(b) 84, 85.



The inspectors are also concerned with guiding the licensee against wasteful mining practices. They expect each licensee to comply with the state's conservation policy. As representative of the state, inspectors enforce compliance with different aspects of mining regulations<sup>304</sup> and ensure that state interests are protected, especially in the attainment of self sufficiency in respect of any given mineral. It is only through inspections that states confirm that a partially relinquished area of a concession is not being worked by any unauthorised person or licensee.

In checking the operational activities of the licensee, most inspectors are concerned to ensure the efficient use of the plant employed in the exploitation of natural resources. For example the Tanganyika (now Tanzania) mining laws emphasize that:

"all boilers, engines, ladders, windlasses, brakes, ropes, winding gear and other mechanical appliances shall be kept in good condition and repair to the satisfaction of the inspector."<sup>305</sup>

In any event, the licensee or his agent may be asked to prepare a boiler, engine or other appliance for inspection. The idea behind this requirement is to ensure a thorough utilization of the resources based on the use of efficient plant and avoidance of metallurgical malpractices.

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304. Mining Act of Zambia, Part VII, Clause 55, (1), 59.

305. Tanganyika (Tanzania) Mining Act, 1969, (Revised Subsidiary Legislation) Cap. 123, Supp. 58, Clause (3)-(10).

## 2. Safety

The provision for safety measures has been discussed in Chapter III c(3). It is the duty of inspectors to ensure that the provisions laid down by states are observed.

## 3. Accidents

States are not only concerned with the thorough exploitation of natural resources with the objective of getting in sufficient revenue, but they also care about other matters that affect the individual worker or the area where the natural resources exploitation is taking place. Accordingly many states stipulate proceedings in the case of an accident. For example the Republic of Somali states that:

"wherever an accident occurs in connection with prospecting or mining operations causing or resulting in loss of life, or serious injury to any persons, the licensee shall report to the inspector..."<sup>306</sup>

In the event of such an accident, the inspector will conduct the necessary investigation. The idea behind such an investigation is to determine whose fault is the cause of the accident. The investigation is usually concerned with the following:

1. Whether the lessee or holder of the rights under the licence or his agent has been guilty of negligence or has not taken all reasonable and proper precautions to prevent such incidents.

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306. Mining Code Law 77 of 22 November, 1970, Annex A art. 83.

ii. If the person killed or injured is employed in the area where the exploitation of natural resources is taking place, or in connection with the mining or prospecting operations, and the licensee fails to satisfy the inspector holding the inquiry that the accident is attributable to the serious and wilful misconduct of such a person, the inspector may award such compensation as be deemed necessary to the relatives of the deceased or injured persons.

Obviously the purpose of inspection is to ensure that the licensee acted within the rights and obligations imposed on him by the licensing state. To the extent that states have granted rights and obligations to the licensee, they are also willing to perform their own obligations under the licence thereby establishing harmony in the whole transaction. This is the basic reason for inspection as a factor in implementing sovereignty over natural resources.

## II. Participating Control

### Introduction

Preambular paragraph 5 of the Declaration on the Principle of the Exercise of Sovereignty over Natural Resources, specifically recognizes:

"the right of all countries and in particular of developing countries to secure and increase their shares in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profit derived from such enterprises on an equitable basis."<sup>307</sup>

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307. G.A. Res. 1803 (XVII) Preambular to paragraph 5.



It is because of the ambiguities in the drafting of the Resolution on Permanent Sovereignty over Natural Resources, that the above provision may alarm foreign investors, and thus have a deterrent effect on the flow of private capital to developing countries. It was not aimed at intimidating foreign private investors, but at giving a strong moral backing to developing countries' fundamental right to bargain for the best deal they can obtain for the exploitation of their natural resources.

The Participation measures are commendable from the African standpoint, because help without self-help is an empty gesture. This sentiment was expressed by President Nyerere<sup>re</sup> in the Arusha Declaration thus:

"Independence cannot be real, if a nation depends upon gifts and loans from another for its development. Even if there was a nation, or nations, prepared to give us all money we needed for our development, it would be improper for us to accept such assistance without asking ourselves how this would affect our independence and our very survival. Gifts which start off or stimulate our own efforts should not be accepted without asking ourselves a number of questions."<sup>308</sup>

The inability of a state to control any area of its economy leads to resentment and frustration. The major objective of participation is to create a sound and stable state of the economy by means of direct national investment, and the

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308. The Arusha Declaration was published by Tanganyika African National Union (Tanu) in 1967.

conversion of resources into a permanent source of income. This enables a state to draw up development plans that broaden the base of the country's economy, so that duplication and reliance on a single source of income are both avoided.

In order to strengthen the participation control over the exploitation of natural resources some states have taken a 51% share of the capital stock of foreign companies.<sup>309</sup> Describing the state take over, President Kaunda stated that:

"participation of the host country in the working of natural resources was necessary because of the lack of mining development since independence."<sup>310</sup>

In this respect a 51% share in, or partial take over of, foreign assets is a result of participating control. (In fact the 51% take over is better described as participating control than nationalization). Participating control of natural resources is highly useful to African states, because such participation facilitates the integration of natural resources enterprises in the economic system of the country concerned, and promotes development of capital and skills.

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309. Libyan Law No. 30 of 20th March, 1971; Nigerian Daily Times 27th Oct, 1971, p.3; Art. 3 of the Agreement between the Government of Sierra Leone and the Sierra Leone Selection Trust published in Supp. Gazette Extraordinary Vol. C.1, No. 79, 1970, p.4.

310. 'Towards Complete Independence' An address by President Kaunda to United National Independent Party (UNIP) Congress at Metro Hall, Lusaka, on 11th August, 1969. See also Ministry of State Participation Economic Report of Zambia No. 26, 1971, p.20.



Justification for participating control can be found in international law. It is accepted in international law that states have exclusive competence to regulate all matters pertaining to acquisition and transfer of property within their territories as well as to determine the conditions for the exercise in their territories of economic activities of both natural and legal persons.<sup>311</sup> It is not lawful for them to require that no foreign owned enterprise should operate at all in certain industries for security reasons, or that certain pursuits be open to their nationals only. A fortiori states may require that their nationals own part of such enterprise.

Participating control, among other things, ensures the domestic supply of any given products. It is the ambition of most developing countries to escape dependence on foreign companies and exploit the resources for themselves. Such a desire can only be fulfilled by participation. The aim of participation is to control national resources, and the control of natural resources is the main object of economic sovereignty. The controlling participation measures limit the authority and privileges of foreign partners; assigning to them a purely business role, depending on services needed, and leaving the ultimate control, to be exercised for the purpose of national economic development, in the hands of the state.

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311. UNCTAD E/CONF.46/141 Vol. 1, General Principle III.



In participating control measures, a foreign partner is only given a minimum authority needed to enable him to play a positive role in the development of natural resources.<sup>312</sup> Instead of the wide and exclusive privileges accorded to foreign companies under the old concessionary regime, measures of participating control assign functions to the foreign partner with a view to achieving definite objectives - thus participating control measure is innovatory - a change from the traditional concession whereby the foreign companies managed the whole operation of partnership arrangements.

A. Management

The structure of the natural resources industry, as well as their increased awareness of the issue of sovereignty, have affected management control arrangement between African states and foreign companies. It may be observed that improvements, in some cases, are not identical. This is because the way the management control arrangement is shaped is influenced by the relative bargaining strength of the parties (which itself is subject to many factors, such as the technical ability of the country concerned, and the importance of a given foreign companies' role to the development

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312. United Nations Publications, Sales No. /.72.11.A.9, 1972, p.17.

of the host country), the host country's concern with the issue of sovereignty and control, and its ability and skill in negotiating with the foreign companies.

No matter what the difficulties inherent in the negotiation of management control arrangements between African States and foreign companies, some facts from the African standpoint are very obvious. Increased control over the operations of a foreign firm, either real or imaginary, promises political and financial benefits. It is also apparent that ownership gives more right of control. However among other reasons for management control are the establishment of the position of host states in the decision making processes of the enterprise. This also enables states to come into contact with the actual decision makers of the foreign enterprises.

Management control measures take the form of appointment of government representatives to the membership of the Board of Directors, though the management control of this nature does not in all cases favour foreign firms. An agreement in Sierra Leone provides an example of minority interests only remaining in the hand of the foreign firm. For example under a renegotiated agreement between the Government of Sierra Leone and Sierra Leone Selection Trust Ltd., a new company (Dominco) was formed with capital held 51% by the Government, and 49% by the S.L.T.S. (Diamond Company).

Art. 4(c) of that Agreement provides that the new company will have 11 directors. Six of them, including the Chairman, were to be appointed by the Government; while S.L.T.S. appointed the remaining 5.<sup>313</sup> All the operating assets of S.L.T.S., as it was constituted during the colonial regime, were to be acquired by a new joint company which would carry on diamond mining. The foreign firm was to appoint the first Manager to carry on the day-to-day operations of the company.

The agreement had provisions for the protection of the foreign firm as a minority shareholder, as well as guarantees for the State (Government). For the security of private firms an affirmative vote of three quarters of all the directors was required for the following:

- i. the termination of the operation of the joint company or the sale or transfer of the assets or rights of the joint company;

- ii. the issue of additional shares, the borrowing of funds, the creation of charges, the making of loans, or the giving of guarantees;

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313. The agreement is contained in Government of Sierra Leone Bill (Domingo Agreement) ratification Act, 1970, p.27. See also American Foreign Service Dispatch A-115, and A-129 reprinted in Mineral Trade Note Vol. 68 No. 2 pp.8-9. In some other African countries, requirements for the appointment of Board members are cast in statutory form for example, The Companies Act passed by Malawi Parliament, which came into effect on Feb. 1, 1972, required foreign firms operating in the country to appoint local directors and inform the government. See Mineral Trade Note Vol. 69, No. 6; Art. 58, Section III, of the Mining Legislation of Zaire empowered the Minister of Mines to appoint Directors whose function will be identical to those in a Joint Stock Company. See Statute 67-231 of 11th May, 1967.



iii. the appointment and the removal of auditors of the joint company;

iv. Any purchase or sale of any product or assets or any other transaction carried out otherwise than on the behest of the joint company;

v. any restriction on the effective implementation of agreements with the government;

vi. the expenditure by the joint company of any funds or the making of any commitments in respect of any new mining operation or facility or of any expenditure, considered by at least three directors to be outside the ordinary course of business; and

vii. the appointment of any committee, board or attorney whose powers include the doing of certain acts.

It can be seen from the provisions of the agreement that African states now have much more say, since any action, financial or otherwise, of the company requires the vote of a majority of directors. Nevertheless in certain circumstances, a state may have a sufficient bargaining power to insist on a voice in management beyond that of its stock-holdings. In many cases, it has not been uncommon in modern concessions for the state to have a veto right over certain kinds of decision, regardless of the size of its shareholdings. A common mechanism for granting the veto has been a requirement

that a unanimous vote of the Board of Directors be obtained before certain matters can be implemented by the management. The presence of at least one state-appointed director is enough to block a decision unfavourable to the state.

Most of the host countries have chosen not to become involved in the day-to-day operations of the firms. To make sure that decisions of importance reach the Board, many states have insisted that the general operating plans of any company be submitted for the approval of the Board.<sup>314</sup> In such cases there is a mutual agreement between the company and the state to keep the state out of the day-to-day operations, while assuring to the state the right to review important decisions. Two central problems face states in instructing their representatives on the Board of Directors of an extractive operation.

- i. defining which issues they are concerned with;
- ii. ensuring that their representatives on the Board of Directors have the necessary technical data to make intelligent decisions on matters before the Board.

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314. In order to make sure that important decisions reached the Board, some states have insisted that general operating plans, usually production volumes, major investments, sales plans, operating plans, and employment plans, be submitted to the Board. See Smith and Wells, *Mineral Agreements in Developing Countries*, - American Journal of International Law Vol. 69, No. 3, 1975, p.578.

It would be wrong to conclude, it appears, that the increase of state participation in the management of the enterprises can help to reduce some of the political problems associated with foreign activities in the natural resources industry. The promise, and sometimes, the practice, of increased control in the hands of states provides at least politically useful evidence that states are concerned with national sovereignty. Again participation in management control, leaves states with administrative and other advantages which are better used after the foreign firms disappear.

B. Management Contract

Where there is an equal share, i.e. the state has 50% and the foreign firm likewise has 50%, and if also the state is financially and technically viable, the management of the operation of the firm becomes a collective responsibility. But the management contract is still popular in Africa, even under a 51% participating control. Some states still want the foreign firm to carry on day-to-day management. For example a Zambian arrangement with foreign companies provides an example of the use of the management contract under shared ownership.<sup>315</sup>

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315. Mineral Trade Note, Vol. 67, No. 7, pp. 12-16. See also American Foreign Service Despatch in Lusaka A-30 and A-93, in 1970, CIPEC Doc. INFO/82 p2



One of the terms of the 1969 Agreement between the Government of Zambia and the Roan Selection Trust (R.S.T.), under which the Zambian Government acquired a 51% equity interest in an RST subsidiary operating in Zambia, included a provision for separate management and consultancy contracts. RST was to provide the following:

- i. technical services (including preparing progress reports, a long term progress report, capital expenditure estimates, advice on operating problems);
- ii. general services (including advice on preparation of the company's report and financial statements, and on the development and processing of minerals);
- iii. specialized services (including engineering consultancy, and staff recruitment).

For the services provided under the contract the RST was to be remunerated to the amount of 0.75% of the state operating company's gross sales proceeds. Among other things RST would receive 2% of the operating company's consolidated profits after certain deductions. The fee for special engineering construction was also to be paid to RST at the rate of 3%. There was also 15% remuneration to RST for total emoluments payable to foreign personnel within the first year. In another different sales and market contract, RST was to receive 0.75% of the gross of sales proceeds of all sales of copper throughout the world, and 2.5% on cobalt sales.

Similar situations prevail in other countries.<sup>316</sup> On the whole, management contract arrangement is based on the need of the country. Just as much as the needs of countries differ, it will be difficult to speak of a standard form of management contract. In some cases the companies remunerations have been based on the volumes of sales and expenses incurred. In some cases another variant emerges such as turning to share profit with a hope that the managing firm would have an incentive to increase efficiency. No matter the basis for compensation, the interests of foreign firms in the management have been limited, unless where they have equity ownership or another form of access to significant portion of profit.

One may view the above on a first evaluation as favouring the host country but it seems erroneous so to conclude, on reflection, since there is a likelihood that the host country will face administrative problems concerning the management contract measures. This is because if the contracting party - (the foreign firm) decides to abandon the contract, the host

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316. Copper Mining in the Congo, illustrates the possibilities of using management contracts after complete nationalization. In 1967 the Congo (now Zaire) Government took over the Belgian owned Union Mineral du Haut Katanga without compensation. In 1969 however the Zaire and Belgian Governments reached an agreement on compensation and on an arrangement whereby the Belgian company would provide management assistance on a fee basis. See Mineral Trade Note, Vol. 68, 1971, pp. 36-42; Smith and Wells, op. cit. Note 314, p. 582.



country might not have learnt enough about the enterprise to carry on. However where a foreign firm is considered important because of its financial, technological or marketing contributions, the new structure (management contract) permits the negotiation of agreements that allocate control and financial benefit in ways that reflect the bargaining power of the parties. In this case ownership of natural resources is negotiated in such a way that the control by foreign firms is acceptable to the host state. All that can be said is that the new structure (management contract) has broken the tight link between ownership, control, and other financial benefits that accrued, in traditional concessions, exclusively to foreign firms. Therefore from the point of view of African states, it has an element of implementation of sovereignty over natural resources, in that most states have discarded the traditional concession in favour of the management contract.

#### C. Joint Venture Business Operation

The rising tide of national independence and self-reliance in developing countries has created a desire for even more active participation by local people in exploitation of natural resources, and a share in the capital and profits of foreign businesses. The joint venture model offers more than mere financial participation in profits to an extent greater than the classical 50-50 profit sharing arrangement.



It enables states to share in the management of the enterprise and control of operations on an equal footing with the licensee or concessionaire partner. The joint venture form of control of natural resources is displacing the traditional concession under which the foreign companies did everything themselves. The new form of economic partnership is recognised by many companies. In fact the late Signor Mattei, founder and the crusader for the new model, and a one time director of (ENI) - Ente Nazionale Idrocarburi was quoted as saying:

"the people of Islam are weary of being exploited by foreigners. The big oil companies must offer them more for their oil than they are getting. I not only intend to give them a more generous share of the profits, but to make them my partner in the business of finding and exploiting petroleum resources."<sup>317</sup>

A joint venture business operation is becoming another form of economic development agreement in the field of natural resources. Unlike foreign economic aid, and financial loans to states, joint venture business operation, as a form of economic development agreement, is an instrument of co-ordination whereby a state and foreign investor establish a complementary relationship in the conduct of an enterprise for a defined period. In some cases the agreement is made between the state's autonomous corporation and an individual or corporation belonging to another

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317. Quoted by Robert Engler in "The Politics of Oil: A Study in Democratic Direction", 1961, p. 198.

legal system. Such agreements are usually contracts for long term exploitation of natural resources.<sup>318</sup>

In many African countries a foreign owned enterprise is precluded by law or policy from investing in the natural resources industry except on condition that domestic participation is accepted by such investor.<sup>319</sup> This is so because states can only get involved in the industry by active participation. In some cases, however, many foreign owned companies are reluctant to engage in joint venture business operation with the host country.<sup>320</sup> Such a refusal to co-operate has partly prompted the government of the countries involved to oppose, in their turn, as a matter of principle,

318. In Mauritania a new company was formed under the law of the country to exploit the Akjoujt copper deposits at Guelis Moghein, an isolated ridge on the coastal plain of Eastern Mauritania. The shares are as follows:

- i. The State (Mauritania): 25%
- ii. French Bureau de Recherche Geologique et Miniere: 7%
- iii. The Chartered Consolidated Ltd: 54%
- iv. Bank de Paris et pays Bas: 43%
- v. Comifer: 2.2%

A similar provision can be found in Ghana Cement Production Agreement:

The Government of Ghana: 75%  
 The Morcen-Norwegian Corporation: 25%  
 See U.N. Doc. E/5170, p. 7.

319. U.N. Doc., Sales E.73 II B 1, 1973, p.7. A study by United Nations Industrial Development Organisation (UNIDO)

320. Ibid, pp. 7-8.

ownership of natural resources enterprises by foreign-owned companies;<sup>321</sup> in their opinion development objectives may be jeopardised by decisions taken by a Board of Directors composed of foreign citizens, motivated solely by their own interests and responsible only to entities outside the host country.

Such beliefs, though in some cases unfounded, should not be ignored, notwithstanding immediate business considerations because consideration of them helps to minimize the deeply ingrained African suspicion of foreign economic domination.<sup>322</sup> Whether such suspicion is justified in a particular case or not, the fears are real and an important aspect of the national sensitivity which characterizes many emancipated people who were formerly held in a state of economic and political dependency.

The procedures regarding the association of African states and foreign concerns or enterprises are always carefully spelt out in joint venture business agreements.<sup>323</sup> In most joint

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321. Ibid

322. Many developing countries have been eager to break away from the traditional form of Agreement. The pressure has been (1) to increase state participation, in ownership of enterprise, (2) for State active role in management and extraction of the resources concerned. See Smith and Wells Jr., op. cit., p. 572.

323. A Joint venture business agreement was concluded between the Government of Libya and an Italian Corporation (AGIP) to exploit petroleum resources, on 30th Sept., 1972. Art. 1 deals with the establishment of the venture.



venture business operations, the participating interest and ownership rights pertaining to parties are usually equal, in most cases 50-50,<sup>324</sup> but in others the states hold a majority of shares. The operation is supervised by the parties through their equal representatives.<sup>325</sup> In any case the close attention given by states to every aspect of the operation is in itself an effective control. Each party bears the cost and liabilities of the venture in proportion to its participating interest,<sup>326</sup> Where the state corporation is engaged in the joint venture with another foreign owned enterprise, they both pay rents and taxes to the state. In this case the state, as well as having a stake in the business, also collects royalty and other rents, as territorial sovereign. In some cases the marketing is done on behalf of the government by the partner, the foreign corporation, except for any part of its share which the government wants to sell directly.<sup>327</sup>

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324. Art. 2 of the joint venture agreement between the above mentioned parties.

325. Art. 8 of the joint venture agreement between Sonatrach - Algerian National Corporation and Getty to explore and prospect hydrocarbon, on 17th Oct., 1968.

326. Art. 6 of Libya/AGIP Agreement: Art. 2, 6 Sonatrach/ Getty Agreement.

327. Art. 8 of Libya/AGIP Agreement: Art. 7, Sonatrach/ Getty Agreement.

At the end of the operation, or termination of the joint venture, the state usually asks the foreign partner to surrender certain data<sup>328</sup> relating to specific concessions or operations. These data may be utilised by the states. But a drawback is that neither the state nor the companies seem to appreciate the inherent difficulty of such provision. For example, how will the state use the data whilst protecting the trade secrets of the company concerned. Does the right of participation give the state any right to divulge that data? Whatever may be the case, it does seem proper that any demand for surrender of data should be accompanied by a provision concerning how the data will be used.

In joint venture operation, most equipment, if retained by states, is compensated for.<sup>329</sup> The method of payment of compensation to foreign partners for this is simple. Usually each partner owns an undivided interest, equal to its participating interest, in all equipment, machinery, and installations, as well as storage tanks in the field, pipelines in terminals and all rights and commitments relating to operations. To determine the amount of compensation, an inventory is taken by the representatives of both parties. The same people are

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328. Art. 9(4) Libya/AGIP Agreement; Art. 34, Sonatrach/Getty Agreement.

329. Art. 9(1) Libya/AGIP Agreement.



responsible for fixing the amount of compensation based on the usefulness of the machinery required by the state. Apart from the compensation issue, there are generally provisions for remittance of companies' profits,<sup>330</sup> and reinvestment of companies' profits in the host country.<sup>331</sup>

Before further investigation is carried out, one may ask what is the rationale of joint venture method of control, in relation to the attainment of economic sovereignty? It is fundamental to joint venture business operation that no party has an advantage over the other. The procedure of equal, or equity participation, of partners is beneficial from the foreign investors point of view, especially when he is unwilling to bear the risk alone, and also for the host government whose psychological and a possibly unfounded fear of exploitation is thus overcome. The joint venture operation in the exploitation of natural resources has proved an effective way of maintaining economic sovereignty because it affords the possibility of integrating the natural resources enterprise into the national economy. For example in the Government of the Republic of Sierra Leone's talks with SLTS (Sierra Leone Selection Trust Limited - Diamonds) in Freetown, the Prime Minister, Siaka Steven, contended:

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330. Art. 13, Sonatrach/Getty Joint Venture Agreement.

331. Ibid.



"that since minerals were wasting assets, his Government was duty bound to ensure their efficient utilisation into vital economic structures for the development of the national economy; with that in view his government decided to participate actively in the country's mining industry."<sup>332</sup>

At its best, a joint venture business operation can be an important experiment in sharing not only legal and financial, but also human responsibilities.

Another aspect of the benefits derived by African countries from such ventures is access to markets. Natural resources in the African continent include copper, oil, petroleum, gas, diamonds, and other minerals of the subsoil. Some of the above mentioned products are produced in such large quantities that they often exceed local needs, and therefore other markets have to be found for them. In this case, the host government has to make use of the foreign partner, whose experience in such markets is generally enormous. In some cases the foreign partner not only agrees to help to sell the products of its partner, the government, but may even buy the products itself, thus giving rise to what may seem to be a buyer's market situation. This is important because the state will receive revenue when the product is disposed of, thereby strengthening its economic independence.

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332. Sierra Leone Trade Journal, Vol. 10, No. 1, 1970, p.10.

By using measures of joint venture control, or participation, a state can secure full control of foreign companies' operations, including the preparation of development programmes and approval of expenditure and investment projects. The enforcement of joint venture business operations leads to a state being fully represented at shareholders meetings, and on all specialised committees. Lack of technical knowhow appears increasingly to be an obstacle to effective exploitation of natural resources. The supply of technical knowhow, like the supply of capital or ready market outlets, constitute a major role of the foreign partner in joint venture operations. It is only when the above factors are in existence that exploitation of natural resources becomes feasible and a source of revenue for otherwise unexploited or wasted minerals have no economic value. The unavoidable need for technical knowhow in African states favours the formation of joint venture business operations with foreign companies in the natural resources industry in order to strengthen their economic independence. As technological improvement continues to expand the productivity of the industry and agriculture, the ability of African countries to participate in this advance becomes the key not only to their competitiveness in international trade, but indeed to their ability to reach the point of sustaining development.

Apart from joint venture business operation between the African states, or state corporations, and foreign companies, there has been a move to organize a joint venture business operation in the oil sector between the African producing and consuming countries through the U.N. Economic Commission for Africa (ECA). This agreement emphasized the necessity of collaboration between the producing and consuming African countries in the short term and long term policies for oil exploration, production, processing, supply, distribution, marketing and consumption. It was further stressed, in the preamble, that such collaboration should, inter alia, have regard for the interests of both oil producing and oil consuming countries, for other forms of energy and for the need to reduce the influence of third parties on the processing, supply, marketing and the price of oil and its products.<sup>333</sup>

The joint venture business operation on regional basis is geared towards coordinating policies and activities of members concerning the exploration, production, processing, transport, distribution, consumption of oil, its by-products, and substitutes, with the aim of accelerating harmonious and balanced economic developments of member countries.

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333. United Nations Economic Commission for Africa, Doc. E/CN. E.P.14/.52, paragraph 3. For an elaborate study of the draft agreement for the establishment of African Oil Organisation see E.C.A. Doc. E/CN/14/E, p.52, pp. 2-15.



Although the emphasis is laid on joint oil production, there is already an element of integration in the field of trade among African states.<sup>334</sup> The relevance of the agreement

334. The treaty for East African Co-operation creating the present East African Community was signed in June, 1967, and came into force in December of the same year. Its main objective is to strengthen and regulate the industrial, commercial and other relations of the partner states in order that there may be accelerated developments and sustained expansion of economic activities within East Africa. The profit accruing from this Organisation is to be distributed equally among the members.

See also the Central African Custom and Economic Union (UDEAC): like the East African Community, the UDEAC originated from past economic links and both groupings approximated to federations at the time of their evolution. The UDEAC was created to replace an earlier Organisation, the UDE, which was created in 1959 between Chad, the Central African Republic, Congo Brazzaville and Gabon. In 1964 the UDEAC came into existence including the Cameroon, but in 1968 the Chad Republic withdrew from membership. The main objective of UDEAC was to establish, gradually, a Central African Common Market through the elimination of all restrictions on trade between member states.

For the same purpose of trading Maghreb Permanent Consultative Committee (CPCM) was established. The protocol establishing CPCM laid down a number of specific areas for cooperation among member countries, which comprised Morocco, Algeria, and Tunisia, in industrial developments, as well as transport, trade and tourism. It may be remembered that an Afro Malagesy Mauritius Common Organisation (OCAM) was created in 1966 and had a fourteen member countries which were drawn mainly from the areas of former French West and Central Africa. Their aims are to cooperate in areas such as industry, agriculture, and communications. The members are: Cameroon, Central African Republic, Zaire, Ivory Coast, Dahomey, Gabon, Upper Volta, Togo, Niger, Ruanda, Senegal, Chad, Madagascar, and Mauritius, which joined in 1970.

West/

to form an all African joint venture business operation in the field of oil, and other economic cooperations is that it is a breakthrough, overcoming many hindrances which disrupted cooperation among African states in the exploitation of natural resources during the pre-independence regime. Under the pre-independence regime, the African continent was partitioned by various powers. This hindered the effective formation of

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A West African Economic Community was established in 1970 to replace the West African Customs Union. The protocol agreement states the objective of the grouping as the improvement of distribution facilities, the development of transport and communications, the harmonization of industrial development with member countries and expansion of inter-African trade.

For a more detailed study of the above economic groupings see U.N. Economic Survey of Africa, 1971, pp. 196-209, Chapter 15.

On 11th December, 1969, South Africa concluded an agreement with three neighbouring countries - Swaziland, Lesotho and Botswana, for a new Customs Union. The preamble states that the old agreement of 1910 required modification "... to ensure in particular that these arrangements encourage the development of the less advanced members of the Customs Union and the diversification of their economies". The old agreement provided for free exchange of products and manufactures within the customs area as well as for the uniform application of South African customs and excise tariffs. All revenue from customs and excise duties were pooled by South Africa, and a fixed proportion, totalling 1.32 per cent, was returned to smaller members. This sharing was based on the ratio of actual collections in member countries in the three fiscal years prior to 1910.

The new agreement, which will enter into force on 1 March, 1970 (though the revenue sharing provisions are retroactive to 1 April, 1969) retains many of the basic features of the old agreement, i.e. generally free exchange of goods, within the customs area, and pooling of revenues from uniform duties for redistribution among the members. However there are a number of important differences. The new agreement provides for each country's share of the common revenue to be determined annually by a formula rather than by a fixed proportion. See ECA Doc. E/CN.14/ST.FTN., 27, p.44.



of syndicates, or cartels among African states, for the purpose of exploiting their natural resources. However the joint venture business operations of African countries will fulfil their purpose only to the extent to which the participating partners are in fact development orientated and have the capital and competence to share more than nominally in the management and control of the enterprise. There may be other difficulties, such as sharing of profits. Nevertheless all interests are likely to be served through a genuine international division of functions, as is the case in truly international companies, whose ownership, management, production and research facilities are judiciously spread among all the countries in which they operate.

Consequently the control of natural resources by means of bringing the different units together for joint venture business operations can be effective, if it is remembered that the accelerated development of economically small, primary producing, export orientated countries requires the promotion of industrialization but expansion in this direction creates a bottleneck in small national markets. The importance of economic cooperation is obvious in Africa, where national markets are in many cases small in size. The exploitation of natural resources has been very slow. There are exceptions, but facts show that outstanding performances are really difficult to maintain, and the relative prospecting of the richest countries is very



fragile, because its basis is very narrow. Above all by joint exploitation of natural resources, each country is assured of a supply, and the problem of scarcity is minimized. At the international level, such multilateral agreements, involving acceptance of restrictions on sovereign powers over certain natural resources with the view to achieving a common good or economic benefits, are common among states; with the result that it has provided an effective way of implementing sovereignty over natural resources.

### III. Forms of Settlement of Disputes

#### A. Arbitration

The arbitral process is of peculiar significance in resolution of disputes in the field of natural resources. This is necessary, since with the passing of years new and unanticipated conditions may arise creating unexpected hardship upon one of the parties. The Declaration on Sovereignty over Natural Resources anticipated such disputes, and accordingly stipulated, in the last sentence of paragraph 4, that:

"Upon agreement by sovereign states and other parties, settlement of disputes shall be made through arbitration or international adjudication."<sup>335</sup>

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335. G.A. Resolution 1803 (XVII) paragraph 4; See Gess, Permanent Sovereignty over Natural Resources, ICLQ Vol. 13, 1964, p. 430. See also Art. XXIX of the Charter of the Organisation of African Unity (OAU) which contains a provision for settlement of disputes.

Arbitration is not only a dispute settlement mechanism in the natural resources industry. It has other aspects which the American Branch of the International Law Association Committee on International Commercial Arbitration had in mind, when it observed the awareness of African states that:

"their participation in international transactions of vital importance to their economic development required the use of arbitration for settlement of commercial disputes."<sup>336</sup>

African states have decided to engage directly in exploitation of natural resources, expand their economies, and international trade. More often than not the execution of the above projects require capital and expertise on long term basis, which has to be provided by foreign citizens and corporations. Long term arrangements are in turn tinged with uncertainty and risks which a foreign entrepreneur is anxious to protect himself against. But the events which may occur in future may be so imponderable as to virtually make it impossible for the parties to make contingent provisions in their contracts. An agreement to arbitrate at any stage of transaction will help to break an otherwise impossible impasse. It allays the entrepreneur's fears about future uncertainties for it creates a confidence that his interest

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336. Report on International Law Commercial Arbitration Progress 1963-64, p. 137 at p. 140.

will be protected by, or at least represented on, a properly constituted arbitral tribunal. The importance attached to arbitration provisions in Africa is attributable to the above considerations. For example, in introducing the arbitration bill, which later became the Arbitration Act, before the Parliament in 1961, the Ghanaian Minister of Justice explained the purpose of the Bill in the following words:

"... I wish only to point out that the main purpose of the Bill is to remedy a situation which is having an increasingly bad effect on the international commercial activity of this country. Hon. members may probably agree that there have been difficulties arising in the course of negotiations of commercial agreements with other countries. Objections have usually been taken by these countries to the provision that the agreement should be governed by the law of Ghana relating to arbitration of differences arising in such international commercial transactions and that this law is totally inadequate.

... The purpose of this Bill ... is to remove this anomaly by providing a comprehensive modern system of commercial arbitration, adopting the most recent convention on the subject, namely the United Nations Convention of June, 1958".<sup>337</sup>

In nearly every African country there exists an arbitration statute. Some countries go so far as to provide specific arbitration procedures relating to investment.<sup>338</sup> There are also provisions for arbitration in cases of disputes arising

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337. Ghana, Hansard (Official Proceedings of Parliament), 1961, p. 99.

338. Ghana Investment Act, Act 172, 1963, S.8(3).



out of joint venture business operations between African states and foreign owned companies.<sup>339</sup> Again an arbitration provision is a common feature in treaties of Friendship, Commerce and Navigation between African countries and developed countries.<sup>340</sup>

Most of these arbitration statutes are drawn in line with the principles of arbitration applied in the former colonial territories. Their basic features and principles follow the same pattern therefore as the English Arbitration Act of 1869.

In some instances the judicial interpretation of these statutes is frequently based upon precedents established by Metropolitan Judges in interpreting their own statute. For example, in the Ugnadan Case of A.V. Roussons Ltd. v. C.J. Valaline & Co. and C.H. Valentine Uganda Limited (quoted by Trwrsh and Tsegah) the Court (Meed J.) in interpreting a provision of the Ugandan Arbitration Act referred to English decisions and explained this course as follows:

"I have referred to reports of English decisions. This Court is not bound by those decisions. I respectfully agree with the comments of Spry J.A. in Rashind Miledina & Co. v. Heima Sinner Ltd. that respect should be given to such decisions. In my view the English judgement to

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339. Art. 10 of Joint Venture Business Operation between the Government of Libya Arab Republic and AGIP.

340. Art. 111(3), Treaty of Amity and Economic Relations between Togo and United States of America, 1966, Part I.

which I have referred contained guiding principles that are pertinent in considering whether or not this Court should exercise the discretion vested in it by the Arbitration Act (Cap. 55) and the Civil Procedure Rule (Cap. 65)".<sup>341</sup>

One peculiarity in the arbitration statutes of some African countries is that no attempt is made in any of them to retain the common law distinction between an agreement to submit a present dispute to an arbitration tribunal and an agreement to submit a future dispute.<sup>342</sup>

The terminology used in much legislation to define the contractual provision, which makes the obligation to arbitrate binding, obscures the traditional common law relating to arbitration clause, which distinguishes between agreements to submit future disputes, and actual submissions. For example the Uganda Statute defines an arbitration agreement as:

"...a written agreement providing for the reference to arbitration or any future dispute relating to a matter specific in the agreement, whether an arbitrator is named therein or not."<sup>343</sup>

The Arbitration Act of Ghana is also not precise in its definition. It substitutes for the object of arbitration the term "difference" in the place of "dispute".<sup>344</sup>

341. 1968 (2) A.L.R., Comm. 178, 183; See also ICLQ, Vol. 24 Part 3, 1975, p. 399..

342. For detailed discussion on Arbitration and Settlement of Commercial Disputes, A Selective Survey of African Practice, see Tiewal and Tsegah ICLQ, Vol. 24, pp. 393-418.

343. S. 1, Arb. Act, Cap. 55.

344. S. 1 the Arbitration Act (Act. 38), 1961.



As one examines arbitration provisions in Africa, one observes a variety of approaches. For example in the Ivory Coast, Libya, Sudan, Togo, Tunisia and the United Arab Republic there are no special provisions for arbitration.<sup>345</sup> In the case of dispute, the party may either resort to the ordinary court, or depend upon any remedy provided in the terms of the contract.

In some African countries, even where there is no Arbitration Act, however, there is provision for the appointment of an arbitrator. A good number of investment codes, especially in former French colonies, contain the above procedure. The general practice is that one arbitrator is appointed by each party to a dispute. The third, according to the majority of codes is appointed by the consent of the two parties. Where the consent is lacking, the code indicates the procedure for choosing the third arbitrator.

It is only in the choice of the third member of the team, that the laws of various countries differ. According to the Investment Code of Chad, the third arbitrator is appointed by the International Court of Justice. In Dahomey, this right is given to a highly qualified authority designated by the Agreement or selected from the judiciary of the country of the investor.

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345. U.N. Doc. E/CN.INR/28 Rev. 2, p. 14.



In the Upper Volta, the arbitrator must be a highly qualified person, which must be named in the contract.<sup>346</sup>

Each of the procedures has its own advantage, and provides that parties have means for redress in the case of an investment dispute. Equally significant is the provision for naming the arbitrator in the contract. This measure from the onset avoids the conflicts that could arise in appointing an arbitrator. It reaffirms the confidence of the parties in the transaction, because they have chosen a person of integrity, whose opinion in certain issues will be impartial.

The relevance of Arbitration provisions in fulfilment of economic independence in the controlling of natural resources is very important. The existence of an arbitration clause signifies that the commercial agreement between the state and the enterprise is to be respected, and that impartial results will ensue in the case of controversies.<sup>347</sup> Furthermore, the effect of an arbitration clause is that it leads to development of settled practice. There may emerge gradually certain customs and principles which lends certainty to transactions.

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346. See the Draft Convention on Settlement of Disputes between States and Nationals of Other States, Meeting of Legal Experts, Addis Abbaba, 16th-20th Dec., 1963.

347. Art. III(4) of the Charter of the Organisation of African Unity (OAU) stipulates, as one of the principles of the Organisation, peaceful settlement of disputes, by negotiations, mediation, conciliation, or arbitration.

The procedure for arbitration signifies a recognition by the State that it will not sit in judgement in disputes involving its own acts, but will rather join with the other party (private entities) in the establishment of an independent judicial body, an arbitration tribunal to which such dispute will be referred for a final and binding decisions. In such cases, states waive implicitly any requirement of the exhaustion of local remedies, and accept an obligation to execute the arbitral decisions.

Where a state refuses to proceed to arbitration as required by the Arbitration Agreement, it is guilty of denial of justice. In the case of foreign investors such a refusal by the host state will entitle them to seek the intervention of their governments on the ground of denial of justice.<sup>348</sup>

However the above assertion does not apply if the host state's refusal stems from general legislation which is not discriminatory or confiscatory or otherwise inconsistent with minimum standards, which according to the *lex arbitri* would invalidate the arbitration.<sup>349</sup> Arbitration provisions, as contained

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348. International law grants sovereign states the rights to uphold the interest of their nationals before the government of other states. See American Journal of International Law Vol. 54, 1960, p. 484 - Netherlands reply to Government of Indonesia: see Prof. G. White op. cit. p. 38.

349. Prof. F. Mann, State Contracts and State Responsibility AJIL Vol. 54 1960.

in most African transactions and statutes, no matter what their shortcomings, give the parties a model for settling disputes in a manner flexible enough not only to meet all the needs of the natural resources industry, but also of international trade transactions.

There is considerable support for the African approach that for the settlement of trade disputes, arbitration is preferable to judicial procedure, even where domestic differences are involved, for reasons which seem universally recognized - arbitration is less rigid, less costly, and less dilatory than the normal judicial procedure.<sup>350</sup> Settlement of disputes through the arbitration forms part of the essential protection which African states give to foreign investors. Such provisions ensure that aliens are capable of enforcing their contractual and property rights, and enjoy the protection of the court. The mere fact that foreign investors enjoy national treatment proves that the control of natural resources by the African states is within the law and not discriminatory.

The adoption of arbitration procedures by African States for settlement of disputes is commendable not only because it enables the party to appear before the tribunal and to present

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350. Rouhani International Agreement and Contracts in the Field of Petroleum, U.N. Doc. ST/TAO/Ser.C.60/ p. 291. See also Henry Catten, the Law of Oil Concession, 1967, p.59.



their claims without restraint, but also because settlement is then conducted in a dispassionate atmosphere. This is achieved by the selection of a venue (place)<sup>351</sup> which has no territorial connection with either of the parties, and designation of a personality, with whom neither party has any association, to appoint the arbitrator, or, in particular, a presiding arbitrator, should the parties fail to agree on his appointment. Such a personality could be the chief executive or judicial functionary of an international body or of a third state. There is an apparent difficulty should either of the parties fail to recognize such an international body. A similar case seems to have arisen in the Peace Treaty between Rumania, Hungary and Bulgaria.<sup>352</sup>

The merit of arbitration for settlement of disputes arising from investment contracts between African states on the one hand and private foreign investors on the other has been recognised. The adoption of arbitration procedure by

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351. Art. 10 of the joint venture agreement between the government of Libya Arab Republic and AGIP, 30th Sept. 1972, stipulates that any dispute or difference arising between the parties in connection with the agreement shall be settled by arbitration. The venue for arbitration will be in Paris at the International Chamber of Commerce. See also the following agreements: U.N.T.S., Vol. 523, p. 241, Art. 4, between the Government of Tunisia, and Government of the Netherlands. Ibid, Vol. 602, p. 235 Art. 6, of an agreement between the Government of Senegal and Government of the Netherlands.

352. Peace Treaty (I.C.J.) 1950, pp. 8-9 between Bulgaria, Hungary and Rumania, one of the parties did not recognise an international body as arbitrator.

the natural resources industry is vital, not only because the resources are important to any national economy, but also because better understanding between the parties is necessary to the discovery of new resources. However the negotiation of such arbitration arrangements may be hampered by the parties disagreeing on an appropriately neutral location for settlement. The fact that agreements between states and private foreign investors are no longer an exceptional occurrence and now extend to many fields of economic activity has made international institutionalisation most expedient. Above all the only way African states can attract foreign capital for the exploitation of natural resources is to assure the investors of fair treatment: this is the sole aim of arbitration measures in the field of natural resources.

#### B. Conciliation

African states have proved that their exercise of sovereignty over natural resources is within the law.<sup>353</sup> This is evidenced not only by control of the activities of foreign enterprise but also by the offering to them of facilities for conciliation as another method for settlement of investment disputes; arising from the contractual arrangement.<sup>354</sup> Though this method is not widespread, it is

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353. Protocol, O.A.U. Charter, 1964, Art. XIX.

354. Art. 17 of the joint venture agreement between Sonatrach-Algerian National Development Corporation and Getty Oil Company 19th Oct. 1968; In Zambia the Chief Engineer is appointed the conciliator, Mineral Act No. 46, 1969 Part XIII Section 94(1).

nonetheless important in consolidating economic independence. In certain circumstances, particularly in the exploitation of natural resources, where state and private entities want to conduct business in a harmonious way, continued cooperation by conciliation may have greater merit than arbitration.

The parties will often need no more than a catalyst, in whom both have the fullest confidence, to assist them in settling their differences. In many cases the mere fact-finding involved in conciliation can by itself be instrumental in bringing about an amicable settlement.<sup>355</sup> As with arbitration, it is a condition of conciliation that it should be voluntarily accepted. But unlike arbitrary awards the conciliation recommendations are not binding.<sup>356</sup> In some instances, however, conciliation has been envisaged as a formal procedure prescribed as a preliminary means for settlement of disputes under state contracts.<sup>357</sup> Such a formal procedure entails in some, though not in all, cases

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355. Mr. Black, one time President of the World Bank, mediated in a financial agreement between the Government of the United Kingdom and Egypt - see IBRD, 14th Annual Report, 1958, p.7. See also Broaches in Proceedings of American Society of International Law, 1961, p.72.

356. Oppenheim, International Law, 2nd ed. p. 13.

357. The Iranian Oil Agreement, Art. 43, and Iranian Offshore Agreement, Art. 38, 1965, prescribed conciliation procedures prior to recourse to arbitration.



certain legal consequences, such as the binding character of the decision, if reached unanimously by the conciliation panel, and the suspensive effect of the conciliation procedure upon the measures which are the subject of complaint and conciliation.

There is another distinction of some relevance. In the case of arbitration the parties will expect the dispute to be settled by an expert - whether legal expert or an expert in the matter at stake - and will rely on a third party to appoint the expert, if they cannot themselves agree on the choice of a person. In consequence, in most cases, the parties will wish to have recourse to conciliation only where they are confident that they will be able jointly to agree on the person who can really assist them to reach an amicable settlement. (In such cases they do not so much need an expert in the case). This consideration explains the fact that the Declaration on Sovereignty over Natural Resources rarely mentions the conciliation procedure. It was presumably the uncertainty regarding the type of dispute which may arise out of agreement, as well as the uncertainty regarding the conciliator to be selected by the third party in certain contingencies, which dissuaded the members of the family of nations from including it in the Declaration on Sovereignty over Natural Resources, and which also influenced them to prefer arbitration as a remedy.

Neither of these reasons necessarily applies to the use of conciliation ad hoc for a particular dispute. In some cases it offers an outstanding advantage. It is only desirable that more use of ad hoc conciliation be made, particularly where it can serve as a catalyst for keeping parties together. It is also suitable in the natural resources industry, where almost every aspect of the government and companies relationship is kept secret from outsiders. From the African point of view conciliation is commendable. By participating in such proceedings, the countries are involved in the complexities of natural resources industry. It offers them a training ground for participation in deciding affairs that concern the most important part of their economy. It gives such states the satisfaction of knowing that they are managing their economy. It is only hoped that the conciliation facility for settlement of investment dispute offered by the IBRD<sup>358</sup> i.e. the International Centre for Settlement of Investment Disputes, will act as a stimulus, and lead to more use of conciliation where appropriate in the natural resources industry.

(I.C.S.I.D.) International Centre for Settlement of Investment Disputes

It is mistakenly assumed in certain quarters, that the developing countries' concept of sovereignty over natural

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358. ICSID Convention, 4th March, 1965, Art. 28.

resources is an absolute one.<sup>359</sup> This assumption will be found wanting in the African approach if carefully examined. This is evidenced for instance by their ratification of the Convention on the Settlement of Investment Disputes. The importance of ratification of the Convention on Settlement of Investment Disputes will be appreciated only when the jurisdiction of the Centre is examined.

ICSID is an international organisation created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States to resolve controversies between governments and foreign investors through conciliation or arbitration procedures.<sup>360</sup> The jurisdiction of the Centre is based on the consent, given by both parties to an investment dispute. One of these parties must be the Government of a contracting State, or a constituent subdivision or agency designated by such a Government. The other must be a national of another contracting State, who may be a natural or judicial person.<sup>361</sup> Once given consent cannot be unilaterally withdrawn by either party, even if one of the contracting States concerned should withdraw from the Centre.

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359. *Journal of World Trade*, Vol. 8, 1974, p. 244.  
(Permanent Sovereignty and the U.N., by Okeefe).

360. The ICSID Convention came into force 14th Oct, 1966,  
Art. 1(1)(2).

361. *Ibid*, Chapter II, Art. 25(1).



Once both parties have given their consent, either before or after a dispute has arisen, either party may file a request for conciliation or arbitration as appropriate, or both parties may do so jointly. The method of filing such a request is regulated by the Institution Rules promulgated by the Administrative Council. Each request must be addressed to the Secretary-General,<sup>362</sup> who subjects it to a preliminary screening for substantive conformity with the requirements of the Convention; unless the dispute is obviously outside the jurisdiction of the Centre, e.g. because a party has never consented to submit it to the Centre, the Secretary-General is required to register the request, whereupon the proceedings are considered as instituted.

Each Tribunal is the ultimate judge of its own competence.<sup>363</sup> It may also decide whether the proceedings are within the jurisdiction of the Centre, and is not bound by the preliminary decision made by the Secretary-General in registering the request. Arbitral Tribunals are required to render an award on the basis of rules of law agreed by the parties,<sup>364</sup> or as specified in the Convention. The failure of a party to appear, or to present its case, cannot prevent the Tribunal from rendering an award, though it is required to follow special procedures

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362. Ibid, Chapter IV, Art. 36(1).

363. Ibid, Section 3, Art. 41(1).

364. Ibid, Art. 42(1).

in case of such a default. The decisions of the Tribunal are taken by a majority of its members<sup>365</sup> and the award must be assigned by them. It is then certified by the Secretary-General.

Once rendered, an award is binding on both parties,<sup>366</sup> who are required to abide by, and to comply with, its terms. Moreover each contracting state is required to recognize as binding all awards rendered in pursuit of the Convention, whether or not its government or any of its nationals were parties to the proceedings.

The African preference for arbitration is reflected in the fact that almost half the states which ratified the Convention on the Settlement of Investment Disputes are from Africa.<sup>367</sup> In fact the greatest use made of the Centre's facilities has been by African states. The first proceeding instituted in 1972, concerned a dispute between Holiday Inns S.A. (a Swiss Company) and Occidental Petroleum Inc. (a U.S. Corporation) on the one side, and the Government of Morocco on the other.<sup>368</sup>

The second request for arbitration, which was registered in 1974, concerned a dispute between Societe Adriano

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365. Ibid, Art. 48(1).

366. Ibid, Art. 53(1).

367. ICSID, 9th Annual Report, Annex 1, pp. 8-9.

368. Ibid, Sixth Annual Report, 1973/74, p.4.

Gardella SPA (An Italian Company) on the one side, and the Government of the Ivory Coast on the other,<sup>369</sup> and the arbitral tribunal was then instituted.

African states have a marked desire to use arbitration in settling commercial disputes in which they are involved. In statutory enactments or decrees relating especially to investments provision is often made for the arbitration of disputes which may arise from withdrawal of the concession, nationalisation, or other measures. Thus the Ghanaian Government after repudiating a number of contracts signed by previous governments with private concerns, worth US \$94.4 million, on the ground that the contracts had been vitiated by corruption and illegality still maintained that:

"...the Government of Ghana would be prepared to go to arbitration in respect of all disputes from our action, and for this purpose we would be willing to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes..."<sup>370</sup>

By submitting a case to the Centre, the prospective parties accepted the jurisdiction of the Centre. One can thus conclude that African states have taken the necessary steps to promote and maintain the investment of foreign capital, thereby disproving any allegations that they adhere to a concept of absolute sovereignty over resources.

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369. Ibid, 8th Annual Report, 1973/74, p.4.

370. Ghana Review, Vol. I, 1972, p.21.



In any event, there is nothing in the Convention to prevent parties to a dispute agreeing on their own rules of procedure for the conduct of an arbitration, in preference to the arbitration rules then in effect.<sup>371</sup> Accordingly the parties may select arbitrators established under the Convention provided they possess the necessary qualities. An aspect of considerable significance is the provision that no state which becomes a party to the Convention shall give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another contractor state have consented to submit to arbitration under the Convention.<sup>372</sup> By giving such consent to such procedures African states prove their creditworthiness to foreign investors who may be interested in development of their natural resources, without losing control of these resources.

#### IV. Law Applicable to Natural Resources Investment Dispute

##### Introduction

One of the important problems in international law in general, and world commercial transaction in particular, is that of the relation between a state and aliens resident in its territory, engaged either in exploitation of natural

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371. ICSID, Art.4.

372. Ibid, Art. 27(1).

resources or other public utilities. In relations between states and private individuals conflicts of interest seem likely. Before the responsibilities of states and licensees can be ascertained, it is pertinent first to establish the law applicable to the economic development of natural resources. The yardstick for determining liability is always dependent on whether there is a breach of a provision of a relevant law, unless it is assumed that these types of contract are always identified with only one legal regime, the issue as to which law is applicable in the transaction between states and foreign enterprise in natural resources industry is a preliminary point.

In Africa the mining laws or acts lay down<sup>373</sup> the general

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373. e.g. Gabon - Law 15/62 of June 2nd, 1962, is the principal mining code.

Zambia. The controlling mining legislation is the Mineral Act of 1954, as amended by Chapter 121 of the Revised Law 1965. Petroleum operations are regulated by the Mineral Act of 1955, as amended (in Mineral Oil Regulation) of 1960 (also amended). Chapter 122 of the Laws, 1965, Law. No. 2, 1965, extended Zambian jurisdiction to the continental shelf which was not specifically defined by legislation.

Ghana. The Mineral Act No. 2, 126 of 1962, supplemented by the Regulations issued thereunder, governs all mining and petroleum operations in Ghana. See also Mineral Rights Regulation, Ordinance, Cap. 153, Mineral Regulation, 1962, (L.1 231); Mineral Regulation, 1963 (L.1 253); Mineral Amendment Regulation, 1963 (L.1 284); Mineral Offshore Regulation, 1963 (L.1 257); Mineral Oil and Gas Regulation, 1963 (L.1 258); Oil Mining Regulation, 1957 (L.W.221/57); Mineral Oil Taxation Ordinance, L. No. 17/1951.

Guinea. Petroleum Law Decree 54-110. (undated).

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principles under which the agreement may be made. They describe the varieties of authorised relationships, but once an agreement is made and ratified by legislation, the mining laws in that particular case fade away, because the agreement itself is deemed a sufficient instrument to regulate the transactions.

In the case of joint venture business operation such an agreement becomes the fundamental or consultative instrument of the joint enterprise between the Government and the concessionaire. It embodies a statement of the rights, duties, powers and privileges of the parties with respect to the joint enterprise, and defines their respective spheres of action.

Ivory Coast. The basic legislation governing the development of Mineral Resources is the Mining Code of July 3rd 1964, Law 64-249. The Ivory Coast has not enacted a separate petroleum code, however, The Mining Code authorizes the development of hydrocarbons under special decrees. Supplementary legislation relevant to the application of law 64-249 to petroleum operation includes Decree 65-96 of 26th March, 1965, and Arrêt 806, of 26th April, 1965. The Ivory Coast claimed a territorial sea of 6 nautical miles in 1967 under Decree 67-334.

Kenya. The Mineral control in Kenya is Mining Act, Chapter 306, Laws of Kenya, 1962, as amended by legal notices 142/1963 and 56/1965, and by the Act No. 21 of 1966, and by Mining Regulations made under the Act. See also Unwrought Precious Metal Act of 1962, Chap. 301, and Gold Development Act of 1962. The controlling petroleum legislation is Mineral Oil Act, Chap. 307 of the Law of 1962. See also Oil Production Act, Chap. 308.

Lesotho. Mining Right 1967, and Mining Rights Amendment Act, 1968. Precious Stone Act No. 24, 1970, regulated the precious stone trade and provided for diamond protection and security. See also Lesotho National Development Corporation Act, 1957; State Mining Act, 1968, G.S. 73; 1968 G.W. 11.



It is an instrument of coordination. Typically it sets forth the complementary functions of the parties in the conduct of the joint enterprise<sup>374</sup> - The bases upon which the gain shall be shared;<sup>375</sup> The manner in which differences shall be settled or resolved, the law governing the agreement and the terms of the joint enterprise.<sup>376</sup>

A proposition that interests some writers is that the concession agreement should remain an autonomous legal order; but this view is not supported by the writer because such an agreement cannot regulate exhaustively, not only the economic and social but also the political issues which are often intermingled in the natural resources industry. This could account for one of the reasons why the majority of African states have ratified the Convention on the Settlement of Investment Disputes. Again no contract can exist in vacuum without being based on a legal system.<sup>377</sup>

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374. Art. 4(1)(a) Joint Venture Agreement, Algerian National Development Corporation and SOPEL, a French firm, 15th December, 1971; see also Art. 1, Libya Arab Republic Agreement with AGIP (Italian Firm).

375. Ibid, Art. 1(3).

376. Art. 16 of the Refinery Agreement between the Federal Military Government of Nigeria and Shell B.P., 25th July 1961; Art. 49 of Ghana Valco Aluminium Agreement; Art. k of the Diamond Agreement between the Government of Sierra Leone and Sierra Leone Selection Trust, 16th Nov. 1970; See also Mining Act of Lesotho Act No. 43, 1967, Section VIII.

377. Lord McNair, General Principles of Law Recognized by Civilized States, BYIL, Vol. XXXIII, 1957, p.7; see also Professor F. Mann, Proper Law of Contract by International Persons, BYIL, Vol. XXXV, 1959, pp. 49-50.

However African countries or states do not rule out the importance to the parties of an agreement, for the simple fact is that it constitutes the first instrument of reference in cases of conflicts and conciliation. Nevertheless an economic development agreement as such is not chosen as an independent legal order to regulate the exploitation of natural resources because of the wider scope of the natural resources industry, and the complexities of the relations involved. The above consideration explains why African states have chosen laws that are of the broadest generality and content in the control of their natural resources.

A. National Law

The parties to transactions always choose their laws, and national laws are always a most favourable choice. For example, the Mineral Oil Agreement between the Government of Sierra Leone and Tennessee Sierra Leone Inc. stipulates that:

"their agreement shall be governed by, and interpreted in accordance with, the laws of Sierra Leone, and such principles and rules of international law as may be relevant, and arbitrators and conciliators shall base the award upon those laws, principles and rules."<sup>378</sup>

By making such stipulations, African states are keeping their control of natural resources within a standard acceptable to producers. For example the contention that the local laws

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378. Schedule 1(19) Mineral Oil Agreement between the Government of Sierra Leone and Tennessee Sierra Leone Inc.



should govern the contract can be traced back in English practice to a dictum of Lord Romilly, M.R. in 1869 in the case of Smith v. Wueguelin. The issue involved was whether or not, where the government of a state contracts a loan in another country, the contract was subject to the law of the state in which the loan was contracted.<sup>379</sup> Another emphatic statement to this effect was made by the Permanent Court of International Justice on 12th July, 1929, in the Serbian Loan Case. In determining the proper law of the loan agreement the Court observed that:

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379. 1869, L.R. 8 Eq. 198. The free choice of law in contract between the sovereign States and individual has been confirmed by the House of Lords in Rex v. International Trustees for protection of Bond holders, 1937, A.C. 500. The case was about a gold loan issued by the United Kingdom Government in New York and subscribed by the American citizen. When the question as regards the effect of the American Abrogation of the gold clause arose, it was assumed that, Britain, being a sovereign party to the loan agreement, English law should govern the contract. The House of Lords rejected such a view and maintained that the governing law was that of the United States of America: Lord Atkins remarked, at p. 351; "It appears therefore that in every case, whether a Government be party or not, the general principle which determines the proper law of contract is the same. It depends upon the intentions of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances and in the latter case, the inference may be drawn that the parties intended the foreign law to apply." In Nyrton Steamship v. Agent Judicere du Tree's, Journal droit International, Vol. 85, 1958, at p. 1003-1009. The Court said that; in effect, contracts concluded between states and foreign nationals may in respect of the applicable law be assimilated to contracts between private persons, where they possess the feature of private government. It was held that English law governed the contract between the French Government and a private shipping company.



"Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of the country...."<sup>380</sup>

The concept that national law must govern the contractual relationship between parties in the natural resources industry has been stressed, to the point of confusion, by Soviet Doctrine. According to a Soviet jurists, the Soviet doctrine rejects:

"the attempts of the imperialists to impose on a state obligatory settlement of disputes over compensation for nationalisation through arbitration or the International Court of Justice. Such a course runs counter to international law. Terms of nationalization, including questions of compensation, are regulated by the national legislation of the state which effects the nationalisation. Claims arising in this connection are handled by its judiciary or its administrative agencies. The examination of such claims on the international plane and, in general, the settlement of disputes between states through arbitration of the International Court of Justice is possible with the consent of all states parties to dispute."<sup>381</sup>

It is evident that the Soviet concept corresponds to some extent to the traditional international law attitude, which maintains that international law is a law which regulates the conduct of states inter se and since an alien party to the contract is not a state, then such a contract cannot be governed by the principles of international law. This view, though supported by the Soviet doctrine, is somewhat outdated, and seems not to be absolute in its application to the

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380. P.C.I.J. 1929, Ser. A No. 20/21 pp. 41-42.

381. Sapozhnikov, Permanent Sovereignty over Natural Resources, Soviet Yearbook of International Law, 1964-65, p.95.

principles of international economic transactions and relations. The simple fact that the majority of African states have ratified the Convention on the Settlement of Investment Disputes seems to weaken the orthodox Soviet view.

On the other hand, there is an instance where agreements are subject to their own provisions independent of the law of the contracting states. This applies to the World Bank Loan Regulation; No. 3 of this section stipulates;

"the rights and obligations of the Bank and borrower under the loan agreement and Bonds shall be valid and enforceable in accordance with the terms. It may be regarded as a reflection of *pacta sunt servanda* and as a statement of the autonomous character of the agreement...."<sup>382</sup>

A typical example of a contract which is denationalized can be found in an agreement concluded between the Sheikdom of Qatar and the Qatar Petroleum Company in 1964. Here there is a slight difference from the above, in that the agreement, instead of being subject to its *lex contractus*, is subjected to the principles of law recognised by civilized states.<sup>383</sup>

The above investigation has revealed that there must be some factors such as the refusal of means to secure redress in

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382. Broaches, International Legal Aspect of the Operation of the World Bank, Hague Recueil des Cours, 1959, Vol. 98, III, pp. 345-346.

383. Section D of the Petroleum Agreement between Shiekdom of Qatar and Qatar Petroleum Company, 1964.

municipal courts, or other forms of denial of justice, before such cases can be brought within the purview of international law. In particular cases, however, the concession agreement may be within the ambit of international law ab initio, either by agreement of the parties, whether express or implied, or from certain obvious facts. What is really necessary in the field of exploitation of natural resources, where legal and economic needs are expanding, is a more realistic appraisal of the situation as it is. In fact Professor Jessup has this to say:

"If those who are trained, particularly in our law schools, and graduate schools of political science, are nourished on the pap of old dogmas and fictions it is not to be expected that they will later approach the situation of transnational problems with open minded intelligence instead of open mouthed surprise."<sup>384</sup>

Despite the fact that natural resources economic development agreements are not treaties, the law applicable to disputes may still vary. Hence the method adopted by African states - the application of national law first, then submission to the Centre on Settlement of Disputes, and, in certain circumstances the application of principles of international law.

#### B. International Law

Many writers have dealt with the proper law of economic concession, but one outstanding error in their work appears to

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384. Prof. Jessup, Transnational Law, 1956, pp. 108-109.



be a misconception that there is a given, or rather, one type of, proper law applicable to the concession. In Africa, and even in the Middle East, there are diversities of cases, ranging from concessions in the form of licences or leases for one type of natural resources, e.g. minerals, to contracts between Head of states and a foreign company for others, an arrangement which is almost on an equal basis.

Thus the process by which international law becomes applicable to natural resources economic development contract can be seen in African approach. For example a concession agreement may be internationalised where the state and the alien have agreed to submit their agreement to a form of international arbitration, for example under Art. 50 of the long-term Convention of Establishment and Implementation between Mauritania and the Societe des Mines de Mauritanie (a Belgian Company) the parties agreed to submit any subsequent disputes to arbitration at the Centre for the Settlement of Investment Disputes.<sup>385</sup>

Another example can be found in the Convention on the Settlement of Investment Disputes between states and nationals of other states, under which nationals of the contracting states may, under Art. 25, have locus standi before an arbitral

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385. Arbitration and Settlement of Commercial Disputes, A Selective Survey of African Practice by Tiewul and Tsesan ICLQ, Vol. 24, 1975, p. 406.

tribunal or conciliation commission established under the Convention's Art. 36 and 28 respectively. Under the Convention, an arbitral tribunal is required to apply the law of the state party to the dispute and such rules of international law as may be applicable.<sup>386</sup> The ratification of the Convention on Settlement of Disputes by nearly all African states has clarified the situation, in that international law is adopted and later on, applied, depending on the circumstances, *ex contractu*, that is a body of law freely adopted by the parties at their free will, rather than *ex lege*, as body of law from which a legal relationship stems irrespective of the will of the parties.

In the field of exploitation of natural resources involving countries that have just acquired political independence and foreign companies, the law is relatively new, and still expanding. As might have been expected there are not enough actual court cases arising out of these contracts between governments and individual private enterprises to form any clear precedents. Obviously statute law establishing appropriate principles is limited and, in the majority of jurisdictions pertinent to our consideration, is often non existent. It is only bearing this

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386. Convention on Settlement of Investment Disputes Art. 42(1).

in mind that one may examine the degree of consensus reached by developed and developing countries on whether the Declaration of Principles of the Exercise of Sovereignty over Natural Resources now stands as the law on the subject. Moreover the fact that African states both allow the licensee access to local courts, and agree to submit any case to the Centre is evidence that their exercise of sovereignty over natural resources is within the law.



CHAPTER VLEGAL FRAMEWORK OF FINANCIAL CONTROLIntroduction

From previous Chapters, it is evident that several factors and considerations have played a part in the development of the widespread belief that a state's economic prosperity is largely dependent on its control of its natural resources. Most African countries think in terms of controlling natural resources for economic development, rather than for prosecution of war; hence every effort is directed towards encouraging investors in the natural resources industries.

The new states have come to realise that foreign capital will flow fastest to countries which make it most welcome. This is a fact of life, which the new states have to face, that foreign capital will flow to countries which have a good climate for investment. This is so because mining companies are only justified in spending shareholders money on expensive 'grass root' exploration programmes in those developing countries which offer the necessary stability and security of tenure. In this respect African states should appreciate that they are in competition with such countries as North America, South Africa and Australia, which not only afford an ideal climate for investment but also offer much scope for successful exploration. Undoubtedly it was the realisation of the importance of this that prompted the recent promulgation

of investment legislation in Africa in the field of natural resources. This Chapter will therefore examine various financial controls and economic inducements available in natural resources enterprise.

I. Investment Regulation

A. Development

The essence of the promulgation of investment legislation promotion as a method of control over natural resources may be appreciated only when a brief analysis of the historical background to problems of capital investment during the pre-independence regime, especially in the natural resources industry, is undertaken. To a great extent capital investment for military and administrative purposes preceded every form of economic development, and also exercised a potent influence on subsequent economic activity. Not all European powers possessing territory in Africa were able and willing to incur these expenditures. Consequently, they resolved to utilize every method available to persuade the private entrepreneurs to undertake the task themselves, a burden which the latter were unprepared to assume without the concession of special advantages. This was therefore the basic course followed resulting in a policy of large mineral and land concessions in many African countries.<sup>387</sup>

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387. Prof. Frankel, "Capital Investment in Africa: Its Course and Effect", a book published under the auspices of the Royal Institute of International Affairs, 1938.

It was also the reason for a great revival, during this period, of the system of chartered companies in Great Britain, whose example was followed elsewhere. These companies differed from the prototypes of the sixteenth and seventeenth centuries in many fundamental aspects. They were created for various reasons. The ideas which led to granting of charters to early companies and which inspired their promoters were entirely consistent with the general principles of government and economic policy, of the times. They were in every respect private concerns, and their founders looked to the advantages of privileges and monopoly for their reward.

There was no doubt that the companies achieved some noteworthy results. They built roads and railways, opened up trade, enforced order, and at all events laid the foundation of administration. But their very success in this direction finally exemplified the transitory nature of the task which they were fitted to fulfil. The fundamental economic reason for the abandonment of the chartered company system in British African Territories was that the companies could only continue as long as they were able to raise capital from the public. None of them was able to continue indefinitely to assume the increasing burden of long term investment in administering and developing vast untapped natural resources within the territories under their control.



Even the Niger Company, which was financially successful owing to the expansion of the trading operations out of which it grew, and in which, in effect, it established a monopoly, was unable to bear the burden of administering the vast hinterlands which it opened up. Moreover it was significant that German chartered companies, which were modelled on the British charter system, all failed in the purpose for which they were created, owing to the fact that their financial resources were inadequate.<sup>388</sup> The chartered company system could not in any given case solve the problem of supplying long term capital investment for territories in which opportunities for immediately profitable production were absent.

The investment procedure adopted in many foreign-owned African territories illustrated the above approach. In most cases the licensees were not able to raise sufficient capital for long term development, and often were disinterested in such activities. The lack of well established investment regulation led to stagnation of economic development in parts of French and Portuguese African territories.<sup>389</sup>

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388. Bismark commenced German colonisation in Africa on the model of the British chartered companies in order to avoid political and economic responsibilities but his plans proved a failure. See Mary Evelyn Townshend, "The Rise and Fall of the German Colonial Empire", 1930.

389. For a good description of the early activities of "chartered companies" in Africa, see Encyclopaedia Britannica, Vol. XXVI, Tenth Edition, pp. 691-702.

It so happened that before the world wars, capital was thought to be the key to open up the African continent. At that time very little was known of what capital could not do. It was only after the chartered companies had given up the administration to their home governments that a little more of the realities and inevitable gradualness of the task involved in developing the vast continent and its resources was realized. Whereas economic growth was once thought to be primarily dependent upon capital, it was then seen that the influence of capital was restricted by far reaching institutional factors.<sup>390</sup> Particularly in Africa its rate of application became increasingly dependent on the extent to which greater skill and knowledge could be imparted to the population and its latent powers stimulated to new activities by more flexible economic institutions.

Unfortunately there was then no form of regulation or legislation for foreign investment in the natural resources industry. Notwithstanding this fact different European Governments, especially the British, did everything to attract private investors into the natural resources industry in their overseas territories. For instance in British dependencies, a considerable part of the early investment was directly financed by government loans and grants-in-aid. Whenever this

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390. Prof. Frankel, op. cit. (Note 387) p.24.



was done it was invariably because without government intervention the capital would not have been made available. Apart from these loans and the powerful influence of the Colonial Stock Act,<sup>391</sup> there was no direct control of investment,<sup>392</sup> nevertheless the direction it took was influenced in many ways. The subsequent diversities did not take place through definite regulation but by the process of consciously or unconsciously influencing public opinion and the expectation of investors.

The exploitation of natural resources had not been as actively pursued in German and French African territories as in British African dependencies because the German and French investors had been less ready to invest in enterprises of so speculative a character as mining. They preferred to invest in fixed interest bearing shares, and moreover they looked more to Europe as a place of investment, than overseas territories.<sup>393</sup> It was therefore natural that the very few private investors concentrated on investment in what seemed the easiest openings for profit. Since not all parts of the continent were explored, it follows that workable deposits were discovered only in the areas to which investment was confined.

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391. For a study of events which led to and influenced the Colonial Stock Act, see "The British Empire", a Report on its structure and problems by a study group of members of the Royal Institute of International Affairs, London, 1937, pp. 290-291.

392. Prof. Frankel, op. cit. (Note 387) pp. 16-29.

393. Lord Hailey, An African Survey, 1930, p. 1513.



## B. Objectives

On attainment of independence African countries assumed sovereignty over vast natural resources, which they could not develop without foreign capital, hence the promulgation of investment legislation, which in its approach and implementation marked the difference between pre-independence and post independence control over natural resources. Investment legislation promotes the framework that facilitates the realization of the exercise of sovereignty over natural resources, just as much as economic planning gives concrete expression to the aspiration that led to independence. The importance of investment legislation in the African natural resources industry lies in the fact that scarce capital, both domestic and foreign, must be channelled to provide an infrastructure. In this respect the function of investment legislation promotion is to announce and define the policy of the government with respect to areas of investment, particularly natural resources, and location of investment i.e. where foreign enterprise may be allowed to operate.

The major purpose of investment legislation promotion is governmental enumeration of the duties of the potential investor, and the privileges accorded to him in return.<sup>394</sup>

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394. See Official Journal of the Algerian Republic No. 53, of 2nd August, 1963, p. 744, for Law 63-277, 25th July, 1963; and Art. 38, Republic of Chad Decree 156/PR, Art. 3; Somali Law No. 10, of 18th Feb, 1960, published in Official Bulletin of Somali, Supp. No. 2 to 5, Art. 13, 14 of the same year (1960).

Secondly, it is to facilitate the method of application for foreign investors, and at the same time to enable the government to select those foreign enterprises which have adequate financial plans and modern equipment, and which, by reason of their location or sector of activities, will contribute to the economic development of the country concerned within the framework of national plans and programmes. States indicate not only the main area of operation in the public, private and mixed sectors, but often enumerate specific natural resources industries which are accorded priority in the process of industrialization.<sup>395</sup> Such industries are mainly:

i. Mining industries which extract and refine or convert solid, liquid or gaseous mineral substances and their affiliated companies serving the purpose of maintenance, construction or transportation, and companies engaged in oil research;

ii. Enterprises engaged in the preparation of processing of local plant and animal products;

iii. Industries engaged in the production and servicing of primary consumer goods;

iv. Fishing industries and ship owners engaged in commercial fishing when they themselves market the products locally.

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395. Law of Mauritania National Assembly of 26th June, 1961, No. 61-122; Republic of Madagascar Ordinance No. 62-024 (essentially a redrafting of Law No. 61-037 of 9th October 1961). In the Republic of Cameroun, priority schedules describe the type of enterprises suited to exploitation of natural resources, see Law 62/DF 297 of 7th August, 1972.



The above industries require capital investment, which at times is supplied by foreign citizens.

A remarkable peculiarity is that most of the ex-French colonies with an integrated investment code have specified approved industries according to their basic economic needs. The natural resources industries in this category are those producing agricultural products, manufacturing and assembling articles of general consumption, mining, and those engaged in production of power, real estate and stock revision.<sup>396</sup>

Another group of states prefer to enumerate their priorities in government publications rather than by including them in the investment legislation.<sup>397</sup> Whatever the case, a scale of priorities exists which indicates the future pattern of industrial development in a given country and the range of choices available to potential investors.

The control of exploitation of natural resources through investment legislation has been embarked on by the African states for the following reasons:

1. the desire to achieve a more equitable geographical distribution of economic development, in areas where special problems - lack of heavy capital, and heavy technological requirements - have hampered, or militated against, the

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396. U.N. Doc e/CN.14 INR, 28 Rev. 2., p.6.

397. Prime Minister's speech in Parliament, News from Nigeria April 1st, 1964, p.10. See also first progress report of the Federal Ministry of Economic Development, Sessional Papers No. 3, DD 48-51, of 1964.



development of natural resources.

ii. In instances where climatic conditions or the long distance from markets have resulted in the disproportionally slow economic development of a particular resource compared to others or the rest of the country legislative measures have been taken to attract industries by means of special tax abatements, accelerated depreciation allowances, and preferential freight rates.

iii. Investment legislation promotion attracts foreign and domestic investors by creating a recognizable structure of and a legal framework for government policy both for potential investors and for administrators.

iv. The exercise of the principle of sovereignty over natural resources in this form has become a universal procedure for promoting industrialisation in African countries.

v. Investment legislation provides an orderly framework within which African states are organizing themselves to reach their economic goals because such legislation embodies the changes in the form of the duties and privileges of investors which the governments need to make to carry out their development plans.

One may say that the investment legislation promotion adopted by African states is welcomed by foreign investors. This is so because a private foreign investor in natural resources enterprise may regard stability - political, economic

and to some extent, legislative - as the principal factor determining confidence. This has achieved international recognition as the following extracts show:

"From the point of view of foreign investors what is decisive is not so much the granting of complete freedom but rather a clear and if possible definitive statement by developing countries laying down the conditions under which foreign capital is accepted (into the natural resources industry)".<sup>398</sup>

It can be seen that the implementation of the principle of sovereignty over natural resources from the African standpoint, has generated a practice, which may now be said to have attained the status of law; evidence of the formal validity of which is derived from the practice of states.

## II. Preliminary Regulatory Agencies

Screening of foreign investment in the natural resources industry as a means of controlling the foreign exploitation of such resources is a post-independence introduction in Africa. Thus in the majority of independent African states access to resources by foreigners, whether by individuals or corporations, is controlled. The prospective investor in the natural resources industry needs the prior approval of a competent government body to which he must submit his plans. Not until a decision is taken by that body on the basis of the country's economic development policy for the particular resource concerned will he be allowed to import his capital.

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398. UNCTAD Doc. TD/13/85/Rev.1, Chapter 5, paragraph 5.



In some countries the application for eligibility must be submitted to the Minister of Finance and Commerce. Usually the application will include the nature and volume of investment, and other supporting documents which must contain a financial and constitutional statement on the nature and function of the enterprise, an economic study of the proposed activities, and the manner in which the proposed enterprise will fit into development plans, and lastly an account of the investment proposed. Such is the case *inter alia* in the Ivory Coast,<sup>399</sup> Liberia,<sup>400</sup> Sudan<sup>401</sup> and Nigeria.<sup>402</sup>

#### 1. Investment Commission

In other African states there is different machinery for the implementation of the principle of sovereignty over natural resources through screening, generally by "an investment commission". This practice is common among countries such

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399. The investment code in the Ivory Coast was enacted in 1959 by Law No. 59-134. Other texts include Decree No. 60-9, 6th January, 1960, and 377 FAEF, 18th January, 1960.

400. See An Act of Establishment of National Production Council, approved by the Parliament of Liberia on 23rd February, at its 43rd sitting, first session.

401. U.N. Doc. E/CN.14/INR, 28 Rev. 2, p. 63.

402. Nigerian Trade Journal, Vol. 12, No. 3, July-September, 1964, p.91.



as Algeria,<sup>403</sup> Cameroun,<sup>404</sup> Ethiopia,<sup>405</sup> Ghana,<sup>406</sup> Madagascar,<sup>407</sup> and the United Arab Republic.<sup>408</sup> Constitutionally these commissions are quasi-governmental agencies whose relations with governments, via ministries, are very intimate. Most of the Investment Commissions are established in conjunction with investment legislation and promotion in the natural resources industry. They are statutory bodies designed for special purposes, processing the applications of potential investors interested in the exploitation of natural resources, and at the same time promoting investment projects by offering technical and commercial facilities.

## 2. Economic Control Commission

Variety exists as regards the name of the screening authorities: in some countries they are called "Commissions for economic control" and are selected from members of national political parties,<sup>409</sup> in others they are called "economic and

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403. U.N. Doc. E/CN.14/INR/28, Rev. 2, p.18.

404. Cameroun Investment Law 60-64, Art. 4-5, of 25th June, 1960.

405. Ethiopian Investment Code, 16th Sept., 1963, Art. 4(1).

406. Ghana Investment Act of 19th April, 1963, Art. 1(2).

407. Madagascar Ordinance No. 60-037, Title II, Art. XIII and XIV of 9th Oct., 1961.

408. U.A.R. Law No. 475, of 1934. The Economic Authority, as the Screening Board is called, is attached to the President's Office, from where the activities of various enterprises engaged in exploitation of natural resources are controlled.

409. In Guinea the particular authority to which an investment programme is submitted is not stated in the investment code, but the main function of the Commission de Controle Economique (Bureau politique national du P.G.R.) is to initiate and create new enterprises.

social councils".<sup>410</sup> Regardless of the difference in names of the screening authorities in different places their functions are identical, and they are all vested with powers to deal with economic and social matters as they affect the natural resources industry and to advise states on these matters.

Screening of investment in the natural resources industry is an administrative act by which the African states control the international flow of goods, services, and capital. It is usually imposed by states for one or more of the following reasons:

- i. to correct balance of payments disequilibrium by allowing only such amount of imports of goods and services, and outflow of capital, as can be financed by earnings from export goods, services and flow of capital;
- ii. to protect nationals from trading with certain states for political reasons;
- iii. to protect national production by prohibiting the free entry of foreign products into domestic markets;
- iv. to channel investment to the development of particular natural resources, where insufficient capital has hitherto been a barrier to progress.

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410. Brochure No. 3, published by the Embassy of Tunisia, (undated) pp. 4-5.



In this respect the establishment of financial institutions or commercial banks becomes pertinent to the exercise of the principle of sovereignty over natural resources.

### 3. Development Banks

In most African countries national development banks have been established.<sup>411</sup> As an instrument for controlling the exploitation of natural resources their main objectives are to assist in the establishment of privately owned industrial enterprises and their expansion. The banks co-operate with the appropriate government institutions in conducting systematic research into sectors of industrial production suitable for operation by private enterprises. The banks ensure that all the selected enterprises for the working of natural resources are appraised on their financial and managerial merits and also ensure that their importance is assessed from the point of view of a balanced economic development and their contribution to the national economy. Among other things, the national development banks certify that the investment is actually directed to the areas which the state has approved. The banks take the responsibility for negotiating the association of

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411. The Algerian Development Bank was established on 21st April by Decree No. 63-182, of 16th May, 1963; See also the Official Journal 21st May, 1963, p. 502. The Cameroun Bank was established on 21st April, 1961 by Decree No. 60-247. In Congo Brazaville an Investment Bank was established mainly to help process and assess foreign investment in the country by Law No. 52-61, of 30th December, 1961. In Ethiopia the Bank took the form of a share Company in August, 1963 - See Art. 304-509 Title IV, of the Commercial Code of the Empire; the Bank of Somali was established by Law No. 8, 1956, Art. 10.



government or private capital with foreign enterprises. Apart from this the banks also provide financial assistance in preparing all projects in the natural resources industry, organizing production, labour, sales, and giving general guidance in the management of the enterprise.

It is quite obvious that screening as a method of implementation of sovereignty over natural resources has a defined objective. Perhaps the most important and, in any case, the most widely found, objective is concern for the condition of the country's balance of payments. Another objective may be attributed to avoidance of the excessive concentration of foreign investment in a few natural resources deposits or fields. Since investment in Africa is mainly directed to exhaustible or non-renewable natural resources, such as petroleum and copper and these industries earn the greater bulk of foreign exchange for such countries, it is pertinent to adopt screening methods in order to ensure that investment complies with the country's general economic policies and long term development plans, and to avoid any balance of payment difficulties arising from unessential investment and to protect the state against any inflationary tendencies which might result from unrestricted investment.

Notwithstanding the control of natural resources through screening procedure, the importation of foreign capital into Africa is left nominally free and the approval of African states is not a mandatory requirement. On the other hand, if such approval is required, certain legal guarantees or privileges, or both, regarding such matters as taxation and exchange restrictions, are granted at the same time, so that the approval of African states becomes necessary in substance, if not in form. Screening of investment in the natural resources industry is often motivated by geographical considerations, especially when states do not want the foreign enterprises to operate in certain areas, such as near their frontiers, or in strategic zones; such practices are international but cannot be evaluated in the abstract since they depend on each country's peculiarities.

The practice of screening is often said to be a deterrent to the flow of foreign investment into natural resources industry.<sup>412</sup> It must be remarked that there is abundant and controversial literature on the question of creating an adequate climate for foreign investments. Yet neither in capital exporting nor in capital importing countries are the needs of an investor

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412. Bradow, *Legal Deterrent to Private Investment*, Grotius Society Transaction, 1957, Vol. 43, 1959, p.51.



clear and precise. After weighing the value of the screening of foreign investment in the natural resources industry as a means of controlling the foreign exploitation of such resources the extent to which it affects the volume of investment of foreign capital in Africa is open to doubts.

It is maintained in this study that the principal shortcoming of the screening system is its inherent lack of legal permanence. This is attributed to the fact that such legislative measures are more liable to changes than the constitutional provisions, special contractual engagements, or indeed commitments undertaken at the international level by means of treaties. The writer would not wish to suggest that changes made in the screening system have often affected basic provisions regarding the legal security of foreign investment and adjudication of disputes. Nevertheless the very fact that these unilaterally enacted measures may also be amended unilaterally is a cause of apprehension to the foreign investor interested in exploitation of natural resources.

It is not disputed that in some cases the criteria in effect express not only nationalistic tendencies but also a desire to protect existing uneconomic or insufficiently financed domestic natural resources industries. Furthermore screening of foreign investment in the natural resources industry may result in the establishment of a government



bureacracy, which may be antagonistic to foreign investors. Another likely source of dissatisfaction from the point of view of investors may be that screening authorities are generally rigid and sometimes may be arbitrary in their application of relevant regulations. Their inquiries into projected enterprises and prospects may be detailed to the point of absurdity, and their standards for valuation of such capital and assets as machinery and patents may be arbitrary and perhaps detrimental to the investors' interests.

Some of these contentions may be true, but they indicate the need for improving rather than eliminating screening practices. From a legal point of view the acceptance of the practice in international law cannot be contested, because screening may be considered as coming under general rules allowing states to impose any restrictions they see fit on the entry and residence of aliens. It is also supported by state practice<sup>413</sup> and by textbook writers, e.g. one learned author stated that:

"In practice every sovereign state is free to organise its own social and economic system to its own liking. This follows necessarily from the normally unrestricted freedom of independent states in matters of internal jurisdiction".<sup>414</sup>

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413. U.N. Doc. A/AC.97/5/Rev. 2, pp. 56-62.

414. Prof. Schwarzenberger, *Protection of British Property Abroad, Current Legal Problems*, Vol. 5, 1952, p. 308.

When once it is recognized that the control of foreign exploitation of natural resources through a screening procedure is the practice of states it has also to be conceded that there is nothing illegal in it if applied judiciously.

In Africa, for example, once foreign capital is admitted into the natural resources industry, it is no way restricted and problems relating to its entry are non-existent. It can be said that there is considerable substance in the argument that a screening practice in natural resources industry is probably desirable from the stand point of an investor, since it carries with it the assurance that the investor has met the requirements of the host country and thereby qualified for any necessary protection and privileges.

Screening of investment in the natural resources industry establishes the role of the state as a regulator. In this aspect the state uses various leverages of control, notably the power to regulate investment in the natural resources industry and the volume and kind of imports and exports, through such means as exchange controls, import and licensing controls. This last-named device, though used by any country that suffers from more than a temporary balance of payments deficit and consequent foreign exchange shortage, is particularly important for African states. At present, on the global level,



the screening method of control of natural resources is commonly used by the industrially developed countries of both West and East so that it has come to witness a situation in which the role of the state as the owner and regulator of natural resources has become sufficiently large to cast doubts on the validity of "capitalist" and "free" as appropriate adjectives for enterprises, but not sufficiently large to justify the appellation "socialist".<sup>415</sup>

Generally, there is no laxity over the control of natural resources by African countries, the rights to which they were stripped in the pre-independence period. The need for effective control of natural resources may be attributed to its importance in maintaining economic sovereignty. Analogously, the dominant concept of sovereignty over natural resources, as exercised by independent African states, may be said to have been implied in the Advisory Opinion of the Permanent Court of International Justice on the Austro-German Custom Union. Thus in interpreting Art. 88 of the Treaty of Peace of Saint Germain of September, 1919, the majority of judges asserted that the article must be understood to mean:

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415. E. Manson (Ed. Manson) *The Corporation in Modern Society*, 1960, p.15.



"the continued existence of Austria as a separate state, with the sole right of decision, in all matters, political, financial, economic, or otherwise ... Austria's independence is violated as soon as there is violation of this right of decision, the different aspects of independence being in practice one and indivisible."<sup>416</sup>

In this context, it is safe to say that the enforcement of the screening method adopted by the African states, to strengthen their control over natural resources, is relevant to the exercise of the principle of sovereignty over natural resources.

### III. Control of Remittance of Capital and Profits

The issue of the control of remittance of capital and profits to the country of original capital investment did not arise in the pre-independence period, not only because there was no investment regulation in the natural resources industry, but also because most of the investors were citizens of the Powers under whose law most African territories were administered. However significant changes took place in the post independence period, whereby the ownership of the natural resources reverted to African states, while the capital and technical know how remained foreign. Since the exploitation of natural resources demands a lot of capital investment, the major supplier of which is still the private investor, any exercise of sovereignty over natural resources will not lose sight of these facts.

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416. See the Advisory Opinion of the Permanent Court of International Justice, of 5th Sept. 1931, on the Custom Regime between Germany and Austria, P.C.I.J. Series A/B No. 41, pp. 45-46.

### A. Repatriation of Capital

African states not only incorporate conditions for the entry of foreign capital into the natural resources industry, but also lay down rules for capital repatriation; for example, the official policy of the government of the Sudan categorically states that:

"the government accepts the principle that foreign industrialists should have the right to remit profits to the country of origin of the capital and furthermore it should give assurances in respect of payment of compensation in the event of acquisition of any property by nationalisation and will also grant facilities for repatriation of such compensation."<sup>417</sup>

Like other methods of controlling the exploitation of natural resources, the approach of many African states, though geared towards maintaining effective control, differs in the percentage of the amount to be transferred. For example some countries have accepted in principle that foreign enterprises are allowed to transfer their capital after amortization at

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417. See African Special Report, Vol. IV, No. 1, 1959, p.20. The system, as it operates in Nigeria, is quite clear in that profits and dividends arising from sterling or non-sterling capital investment in approved projects may be freely transferred to the country of origin and such capital may be repatriated at will; prior permission for non-resident capital investment and approved status must, however, be obtained from the Federal Ministry in Lagos. See Statement by Alheji Kkzori, Minister of Economic Development, July 15th, 1964, p.6. A guarantee of freedom to transfer profit abroad is also given to foreign industrialists by the Republic of Congo-Brazaville - See Law No. 39/61, 20th June, 1961; See also Kenya Government Investment Bill, 1964, Art. 7(a)(b)(c); Ghana Investment Act No. 172, of 1963, Art. 3. The Government of Gabon guarantees absolute liberty of transfer of capital and profits - see Investment Code of 8th Nov., 1961; Uganda Industrial Charter 9th June, 1964, Art. 3; Investment Code of Niger, No. 61-21, of July, 1961, Art. II.



the rate of ten or fifteen per cent counted from the last exempt fiscal period. In addition all foreign investors or tenders are authorised to transfer annually some of the interest, and at least twenty per cent of their shares of the annual net operating profits. A portion of wages (thirty per cent) paid to foreign personnel is also often transferable.<sup>418</sup>

Another group of countries stipulates that any enterprises working their natural resources will benefit from the facilities of transferring funds under the existing investment legislation in force at the time the transfer is sought; in addition sums resulting from liquidation or sale of enterprises or of shares and special capital stock are guaranteed on parities established by the International Monetary Fund.<sup>419</sup> In some cases aliens are only allowed, subject to verification by the competent authority, to remit 'dividends, proceeds and liquidated assets of capital invested in the original currency to the country of residence'.<sup>420</sup>

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418. Guinea Investment Law 50An/62, Title IV, Art. 20-24. These provisions apply notwithstanding the foreign exchange regulations in effect in the Republic.

419. See La Depeche d'Algeria, 12th July, 1963, p.5. This applied to the whole portion of the profits and sums pertaining to imported foreign capital.

420. Investment Code of Senegal, 21st March, 1962, Art. 6.



Apart from such stipulations in various laws, there are a series of economic development agreements concluded between African countries and developed countries containing capital repatriation provisions. For example Art. 2 of the Convention between the Government of the Kingdom of the Netherlands and the Government of Tunisia reads:

"Transfer of profits, interests, dividends and royalties due to nationals or corporations of the other party will be effected."<sup>421</sup>

The repatriation provision features in almost all investment laws, not only as a means of exchange control, but also for promotion of a good investment climate in the continent.

There are still apparent difficulties not yet realised or provided for by the parties, in the provisions for transfer of capital to the country of original capital investment.

Among them are:

- i. with which country of origin is a Multi-International Company identified?
- ii. Does the devaluation of a particular currency in a particular country affect the percentage of transfer?

The answers to the above questions can only be provided by the parties - i.e. States and Investors; private persons or companies.

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421. U.N.T.S. 523, 1965, p. 239, Art. 2. A similar treaty was concluded between the Kingdom of the Netherlands and the Republic of Senegal on 12th June, 1965. Ibid, Vol. 602, 1967, p. 233, Art. 2(2).

It must be noted that this principle, which safeguards the repatriation of profits to the country of original capital investment, has become law in African states; not merely because it represents a universally recognised standard of justice, but also because it is absolutely essential for the welfare of every nation, for without such guarantees to foreign investors, no commercial or international financial intercourse could safely be carried on. Accordingly the real basis for the adoption and enforcement of the guarantee of remittance of profits to the country of original capital investment, as an element in implementation of the principle of sovereignty over natural resources in international relations, is its appeal to enlightened public opinion, not only because of its inherent justice but also on account of reciprocal benefits. It derives its real value and permanence from the universal need of nations for foreign trade to ensure their prosperity and their mutual benefit resulting from the investment of foreign capital for the development of natural resources.

#### B. Remittance of profits

A permit to transfer profits given by African countries to foreign investors goes hand in hand with the principle of international law prohibiting the confiscation of foreign-owned property. However the growing intercourse between African states and other members of the family of nations



has necessitated the improvement of the fiscal treatment of aliens, and the establishment of their fiscal rights upon a more stable and uniformed basis than mere special privileges. Especially when it is accepted that a foreign investor in the natural resources industry may wish to exercise his repatriation rights in a number of instances, such as on the liquidation or reduction of investments, the surrender thereof to another party, or where a reduction in capital occurs or in the event of a take over. In the main African states have used positive methods to bring about the above conditions by concluding bilateral and multilateral treaties. Obviously the repatriation of profits on capital to an extent not detrimental to the balance of payments of the host country is commendable, since such procedure enhances not only the investment climate, but also affords the host country the chance of controlling the exploitation of natural resources.

#### C. Tax on Profit

The financial relation between states and the natural resources industry is distinguished by special features in that the state, where it has assumed ownership of mineral rights, can, in addition to ordinary taxation, claim a share of the profits representing the public interest on which the industry is drawing. There are however factors which set a



limit to the amount at which the state can assess this interest. Natural resources, especially minerals, are so important an element in general development, that it is impolitic to do anything which would jeopardise the flow of new capital into the natural resources industry.

The speculative element in mining and the heavy outlay required for certain ventures, such as deep-reef gold mining or large copper and oil concerns, combined with the fact that the asset often has a terminable life, justifies a return to the investor on a higher scale than that of ordinary commercial profit. Further the interests of the community demand that the deposit should be thoroughly worked and the maximum amount of low grade ore extracted but too heavy demands by states may lead to wastage of marginal ores. All these factors fall within the field of fiscal policy and must be considered in relation to the returns which the investment market has normally earned on the capital which it has provided.

In the pre-independence period there was diversity of approach to the imposition of taxes on the profits of licensees or companies exploiting natural resources.<sup>422</sup> Profits are also taxed in the post-independence period, but each country

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422. Lord Hailey, *An African Survey*, 1938, p. 1530.

has adopted the policy most suited to its particular natural resources. For example in Zambia, a new system of mining taxation was introduced with effect from 1st April, 1970. The new tax provisions are incorporated in the Mineral Act of 1970. The most important change is that all mineral royalties, and in the case of copper, the export tax as well, have been abolished and are replaced by a Mineral Tax charged entirely on profits at the following rates:

Copper: 51 per cent

Lead and Zinc: 20 per cent

Amethyst and beryl: 15 per cent

Gold, bismuth, selenium: 15 per cent

Cobalt Silver, and gadolinium: 15 per cent.<sup>423</sup>

In order to establish the profit each company is allowed to deduct all expenditure incurred during exploration and prospecting in the same year. The companies are allowed to carry forward accumulated losses and unredeemed balances which effectively means that for tax purposes the distinction between the operating costs and the capital expenditure has been established. In the case of old mines the carry forward of unredeemed capital expenditure which has been outstanding

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423. Economic Report of Republic of Zambia No. 26, 1970, pp. 22-23. The situation is slightly different in Zaire, another African copper producing country. A performance tax, as it is called in Zaire, is within the discretion of the Minister to determine. See National Mining Law of Congo (Zaire) Vol. 1, Section VII, 1967, Art. 78.



for a long time is written off. The main purpose of this new system of capital allowances is to improve the discounted cash flow rate returns on new investment and thus promote development in the mining sector.

In some other countries it is stipulated that the licensees shall pay such income tax and other taxes and imports as are payable under the law of the country. Apart from that they are also subjected to any form of taxation or other exactions the nature of which the state may in the future decide.<sup>424</sup> In all circumstances, public interest demands that taxation should be at the highest possible level, subject only to paying due regard to certain factors inherent in the nature of the industry itself. The exploitation of natural resources involves enormous amounts of money, and tax on profits must have due regard to the return which the private investor will expect from an investment in what is essentially a wasting asset.

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424. Libyan Law of 1955, as amended in 1961, Art. 14. In Nigeria, the provision for calculating the oil companies profit and loss account is laid down in Section 9-15 of the Petroleum Profit Tax Act. Profits are calculated as an aggregate of:

- (i) the proceeds of the chargeable mineral resources sold by the companies;
- (ii) the value of all chargeable oil disposed by the companies;
- (iii) all income of the companies in that period identical to, and arising from, any one or more of its petroleum operations. See Petroleum Act 1959, No. 15; See also Decree of 1967, amending the same Act; the Petroleum Act was amended in 1970.

In Algeria, the direct tax on profit is determined as follows: If the amount of royalty exceeds the amount of taxable profits a sum equal to one half of the difference between such two amounts may be deducted by the payee; See/



Antiquated fiscal policy however may impose excessive burdens on the enterprise and thereby deter the rapid development of natural resources industry. It is of great importance that African countries have realized this and have so far insulated enterprises engaged in the exploitation of natural resources from this burden, by granting them some exceptions. This method of exercise of sovereignty over natural resources, in the view of the writer, is justifiable because where such privileges are granted to enterprises, engaged in working natural resources for some period of time, they are tantamount to a semi-permanent subsidy which African countries cannot afford to give to foreign investors for the development of their natural resources.

This does not undermine the right of a sovereign to tax aliens working natural resources in his territory; for this right has been advocated in international law in three basic concepts:-<sup>425</sup>

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See Petroleum Code, 1958, Art. 65. The Petroleum Code of Morocco provided that, if the total sum paid by the licensee, as tax, royalty and duties is less than 50% of the profit the licensee will pay surtax equal to the difference between the sum and one half of the profit:- Petroleum Code, 1958, Art. 31.

425. Albrecht - Taxation of Aliens Under International Law, British Yearbook of International Law, Vol. XXIX, 1952, p. 145.

i. the 'contractual' according to which taxation should be regarded as a payment for the exploitation of the non-renewable assets of the state.

ii. the so called 'ethical' which affirms that taxation of an alien engaged in working natural resources is justified on the grounds of the privileges and protection accorded to him by the states in which the resources lie.

iii. 'sovereignty' according to which taxation is justified solely as a means of expression of the will of the state, limited only by international law.

The taxation of aliens, whether on their profits accruing from the exploitation of natural resources, or ordinarily, by states in their capacity as territorial sovereigns, is recognised in international law, and is supported by a decided case by international tribunal. For example in the George W. Cook claim to tax exemption, which was decided by the United States Mexican Claims Commission, the report of the Commission contained the following significant passage:-

"the right of every state to levy taxes constitute an inherent part of its sovereignty. It is a function necessary to its very existence..."<sup>426</sup>

One may deduce from the statement of the Commission that no law, whether municipal or international, may restrict the free exercise of the sovereign power of the state in this regard.

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426. See the Opinion of the United States of America/Mexico Claims Commission, in George W. Cook Tax Exemption Case, reported in Annual Digest, 1929-30, Case No. 156.



Apart from the fact that the right of a sovereign to tax an alien cannot be contested in international law African states have gone further in using their tax systems to improve their investment climate for private investors. Most of the economic inducements are in the nature of fiscal concessions which enhances the early stage of production in the natural resources industry. In this way the foreign investors are assured that the exercise of sovereignty over natural resources is not only in keeping with the principle of international law, but can be carried further to promote mutual understanding between the host Government and foreign concern and thereby strengthens the effective control of the exploitation of natural resources.

#### IV. Other Financial Obligations

It is within the prerogative of every state to impose a financial levy on any concessionaries or companies working natural resources. The validity of this right, though limited by international law, cannot be contested since it is an attribute of statehood. The right of a state to impose a financial obligation on persons working natural resources is not rendered inapplicable by the fact that the aliens do not recognize the foreign taxing state as their own sovereign, for while they cannot, for this reason, be compelled to pay taxes to a state on the ground of political allegiance, they may



nevertheless become subject to taxation or imposition of other levies by virtue of the territorial sovereignty of the foreign power, whenever they, their properties, or their economic activities are located within the state jurisdiction.<sup>427</sup>

Thus no sooner do companies enter Africa in order to work natural resources than they incur financial obligations. These can be in the form of fees, rents, custom duties, or they may be taxes on profits. The amount may differ depending on the availability of natural resources, and the competitive character of concessionaires.

#### A. Fees

The preliminary step to asserting sovereign rights over natural resources is the imposition of fees on a low scale, to test the viability of prospective licensees. These fees are levied for exploration licences.<sup>428</sup> Similar fees are payable for pipeline licences. In some cases the fees payable vary according to whether the application is for a permit to survey a pipeline route, or whether it is a licence to construct and operate a pipeline. There are also fees for prospecting licences, for mining leases, and sometimes for operation of rigs.

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427. Albrecht, op. cit. (note 425) pp. 149.

428. Nigerian Petroleum Decree, 1969, Sch. 1, paragraph 2, See also Mining and Exploration in Sudan, Bulletin No. 25, 1974, Section 13 - Fees of L.S. 500 shall be paid on grant of licence. In Zambia the fee payable for prospecting is K.15 per square mile. See GIPEC Doc. LGG.8/Appendix p.9.

However it should be remarked that the fees levied on licences of all classes are of a token nature only. The main purpose at this stage being to regulate these activities and to exclude undesirables from them, rather than to create any source of substantial revenue for the Government.

#### B. Rents

Payment of rents by the licensees to the host state for the period of the exploration licence is one of the ways African states are controlling the exploitation of natural resources. The amount of rent changes with specific operations, as for instance in petroleum drilling and production.<sup>429</sup> For example in Zaire mining contribution and licence fees are as follows:

First renewal	80 Zaire
Second renewal	160
Third renewal	320

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<sup>429</sup>. In Zaire Mining Contribution and Licence fees for renewal of individual prospecting licences are contained in Government Decree of 8th January, 1969, No. 85/69; Rents payable for mining licences are contained in Decree 430/68, 31 December, 1968. In Nigeria, a rent of \$250 (N.500) is paid to the Ministry of Mines and Power for each Calendar year that an oil exploration permit is in force. In the case of mining leases the rent is N.1; see also Tennessee-Sierra Leone Government Oil Agreement, of 1962, Section 15(1)(2) (22nd March).



Such payments are usually collected on behalf of the state in advance by a Department of the Ministry of Finance (the Accountant General). Apart from rent, the licensees are required to pay rates, the amount differing according to the country and to the area occupied during the exploitation process.

There are situations in which the licensee may have his money refunded; such situations arise when the government itself acquires a part of the area for which the exploration licence has been granted, or there is a voluntary surrender of a licence by the licensee, in which case he may still be asked to pay yearly rent or royalties depending on the circumstances and the time of surrender of the permit.

#### C. Premiums

These are cash bonuses which as a rule are paid before the grant of an oil prospecting licence or oil mining lease. The premiums are paid in addition to rents. The amount of premium charged depends on workable minerals an area contains. Areas with enormous workable deposits carry high premiums, but for other resources in territorial water and land, the amount varies.<sup>430</sup>

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430. For a detailed study of various premiums paid by oil companies, see, *Story of Oil in Nigeria*, Shell B.P. Development, 1960, p.5.



The premium charges come under the executive power of the state and are imposed on the licensee in return for the privileges enjoyed within the territory of the host state. In some countries the policy adopted for the payment of all premiums for the exploitation of natural resources is similar to that of oil prospecting or copper as the case may be, but a difference is that a premium is not charged when converting a prospecting licence into a mining lease.

#### D. Royalty

Royalty in some cases is related to a portion of the land produce, which must be paid or offered to the proprietor in return for utilizing the resources of his land.

In the natural resources industry, royalty takes the form of an ad valorem tax which the licensees or concessionaires must pay and is based on the value of the natural resources product concerned, e.g. copper, oil, gas, phosphate or other mineral substances. States justify the imposition of such payment as within their sovereign powers on the ground that the state is placing its non-renewable national assets at the disposal of the licensees; such fees represent a compensation for removing those non-renewable assets.

In the pre-independence period in Africa the term royalty as then known, e.g. in Great Britain, owed its origin to the fact that gold and silver procured from land by mining or

similar means were, by ancient usage, held to be part of the prerogative of the sovereign. The Governments of other countries, such as Belgium and France took advantage of their legal position as the temporary owners of mineral rights in Africa, and also made the payment of royalties a condition of granting of concessions to exploit natural resources in their various African territories. This development was not unnatural in view of the fact that in many of these countries the principle of direct taxation in the shape of income tax or its equivalent did not for some time exist.<sup>431</sup>

In areas where royalty was demanded, the approach of the different powers diverged. The British Government has a systematic way of assessing the royalties payable by each company;<sup>432</sup> But in the Belgian African territories, the companies themselves were empowered to collect royalties.

In the post-independence period the system of payment of royalty to states continues, but significant changes have occurred, not only in the concept but also in the method of assessment. In exercising their sovereign rights over oil resources African states, in solidarity with other oil producing

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431. Lord Hailey, *An African Survey*, Revised, 1956, p. 647.

432. See *Mining Royalty and Rents in British Empire*, published by the Imperial Institute (Mineral Resources Dept.) 1936, p.14.

countries, brought the issue of royalty before the meeting of the Organisation of Petroleum Exporting Countries (OPEC) comprising oil producing and oil importing countries.

At the OPEC's meeting the equal profit sharing concept was discussed on the understanding that the total royalty and income tax paid by the concessionaire would be 50% of the net profits and would represent the producing countries overall share. Consequently royalty payments were deducted from the income as an expense in computing the income tax payable to producing countries.

African countries and other oil producing countries challenged this approach. They argued that the royalty was a payment ordinarily made to the owner of the ground, in consideration of depletion of natural resources. They also contended that royalty should be paid to states independent of tax. After a heated argument and prolonged exchange of views, an agreement was reached between the oil companies, which were mainly represented by their various home governments, and the oil producing countries, on what was described in oil industry jargon as "expensing royalty". Under this system the royalty was treated as an expense in computing income tax instead of as a credit against tax, the system which prevailed in the companies' practice before.<sup>433</sup>

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433. OPEC Resolution on Renegotiation of Agreements with Oil Companies, Res. XXV 160, of 16th September, 1970.



Most of African countries have implemented the new OPEC agreement. For example in Nigeria the position has been regulated by a new decree,<sup>434</sup> which stipulates that royalty is to be calculated on a full posted price system rather than on the field storage price. Many Middle East countries have, like Nigeria, also adopted the OPEC system.

In most of the countries which are members of the Intergovernmental Council of Copper Exporting Countries (CIPEC)<sup>435</sup> royalty is replaced by a mineral tax based entirely on profitability (a Pay as You Earn Basis (PAYE)), at monthly intervals, and a company tax, based on the balance of profits. Other African countries, which are neither members of OPEC nor CIPEC, have copied one or other of the systems.<sup>436</sup>

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434. In Nigeria, this decree introduced, for the first time, the concept of posted prices for determining royalty as opposed to the realized price to which the companies had been accustomed - see Supp. to Federation of Nigeria No. 62, Vol. 56, 27th Nov., 1969, Part B.; Petroleum Drilling and Productions Regulation 60(4). See also West Africa, 7th of May, 1971, p. 525.

435. See Zambian Economic Report No. 26, 1970, p.2; Mining Laws of Congo (Zaire) Vol. II, Section VII, 1967.

436. Sierra Leone Republic is not a member of OPEC or CIPEC, but it also adopted the 12½% like Nigeria. See Tennessee-Sierra Leone Mineral Oil Agreement, Sch. IV, Section 16(1), 2(a), 3(a)(b) of 22nd March 1962; the Sudan also adopted similar procedures, See Mining and Mineral Exploration Bulletin No. 25, 1974. Royalty on petroleum produce must be calculated at the rate of 12.5% on the well head value of all crude oil and natural gas provided that the Government may elect to take petroleum or petroleum products in kind, in satisfaction or part satisfaction of the royalty due in any year, p.10(b).

The new system of payment of royalty reveals two salient points concerning implementation of sovereignty over natural resources. They are that:

i. The companies now pay royalty, in whatever form, to African states, which they never did previously; rather they paid out to the various powers that then controlled African territories.

ii. The pre-independence system for calculating royalty has not only been modified, but a new concept has been suggested by the OPEC countries - expensing of royalty.

#### V. Economic Inducements

Many African states accord a various and vast range of economic privileges to enterprises engaged in the exploitation of natural resources. Such a procedure is not merely a response to the states' demands for thorough development of natural resources but is part of a structured programme of systematic investment promotion. For example, under the Algerian Investment Code three types of economic benefits are given to approved enterprises in the natural resources industry. They are:

i. State protection against foreign competition within the framework of Government policy on imports.

ii. Assistance of state financial bodies for the purpose of obtaining loans for new equipment.

iii. Orders for supplies for Government offices and public works.

Apart from the above provisions economic inducements are usually in the form of tax exemptions, to a certain degree, for income and profits taxes and import and export duties. In some cases there is also a provision for generous depreciation allowances including reduction on turnover tax, standard tax, and business tax.<sup>437</sup> Equally significant in this sphere are such benefits as exoneration from the payment of import and export duties on manufactured goods.

As a rule the above economic benefits are granted to enterprises which already have, or have acquired, a certificate of exemption, or have been approved by a recognised government agency in the natural resources industry.

#### A. Temporary Exemption from Tax on Income and Profits

One salient feature of the African approach to implementation of the principle of sovereignty over natural resources is the practice of granting to a licensee a temporary exemption

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<sup>437</sup>. It must be remarked that the general concept of taxation is different in civil and common law countries. The type of taxation this study is concerned with differs from the Anglo-Saxon systems and concepts. Reference in this study is made to such tax devices as:  
 (i) Entry tax (Droit fiscal d'entree) levied for revenue purposes on nearly all goods from foreign countries;  
 (ii) Standard tax (Tax forfaitaire) which is a type of transactions tax based on custom duties and fiscal entry tax.



from taxes on income and profits. In order to attract foreign investors in to the natural resources industry most African states exempt foreign investors from payment of tax on income and profit for a period of five years. For example, an Investment Decree of Ethiopia stipulated that:

"exemption from income tax is granted for a period of five years to new enterprises investing Eth. \$200,000 and above in agriculture, mining and transport..."<sup>438</sup>

Variations exist in the time period in that some countries grant 10 years exemption,<sup>439</sup> from the date of production. This period is regarded as long enough for installing machines and other plants for the beginning of operations.

In most cases it is the amount invested in the natural resources industry that determines the privileges granted. For example, in the three year development plan of Mauritania, it is stated that:

"Companies of exceptional importance investing a minimum of 1000 million (F.A.) francs (U.S. \$ 4 million) in less than five years and accorded the long-run financial stability regime, benefit from stabilization of some of all taxes and other state imposed costs for periods of up to twenty-five years".<sup>440</sup>

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438. The Investment Decree was promulgated on 16th Sept. 1963. The five years exemption privilege begins from date on which the enterprise starts operation.

439. Ghana Investment Act No. 172 of 19th April 1963, relates to tax holidays not exceeding 10 years - from the date of production. The same provision was embodied in the Valco Ghana Agreement to manufacture Aluminium of 1960 Art. 15, 17, 20.

440. Mauritania, Three Year Development (1960-3) Plan, Law No. 61-122. This plan was replaced by a draft Four Years Plan, 1963-66. See (Plan Quadrennial de Development Economique et Social).

The precise effect of tax incentives in attracting investments which otherwise would not have been forthcoming and, conversely, the revenue loss suffered where concessions or licences are granted though not needed is as yet inadequately studied. Such empirical enquiries<sup>441</sup> as have been made to elucidate the actual inducement effect and overall operation of various schemes confirm the expectation that while prohibitive and discriminatory taxes may effectively impede otherwise worthwhile investments temporary exemptions from normal tax burdens are unlikely by themselves to constitute a determining factor in many investment decisions.

However the importance of exerting sovereign rights over natural resources through tax incentives, or rather temporary tax exemptions, is that it helps arouse interest in investment opportunities which might not otherwise attract attention in the natural resources industry of particular countries. Such schemes have now spread to all African states. Since most of these laws are addressed not only to foreign investors but also to domestic investors, one can see that there is no basis for thinking that tax exemption is discriminatory.

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441. Karl E. Lachmann "Industrial promotion laws in Central America" United Nations Technical Assistance Report prepared for the Committee on Economic Co-operation of Central American Isthmus (TAO/LAT/29/1960) Chapter 1; Paul L. Cheng-Young "A Study of Tax Incentives in Jamaica" National Tax Journal Vol. XX, No. 3, September 1967, pp. 292, 304; George E. Lent "Tax Incentive for Investment in Developing Countries" IBRD and IMF Finance and Development September, 1967, p.5.

It is quite true that the content and scope of tax incentives vary, as do the criteria (relating to economic sector size and use of domestic and human resources), which determine the selection of qualifying investment projects, and the particular natural resources industry towards which it will be directed. It is likely that these variations in tax incentive as a proof of exercise of sovereign right over natural resources, will call for some measures of harmonization, at least among neighbouring countries and within economic integration areas, where tax incentive difficulties are more likely to have a distorting influence than in cases where countries are wholly unconnected and distant.

Though African states are giving tax exemptions to attract foreign investment in the natural resources industry there are also provisions for reinvestment, in the same industry, of profits - a "plough-back" system. For example the Decree relating to investment issued by the Government of Tunisia contains the following provisions:

"Income must be reinvested for certain purposes.... especially in extension of industrial, commercial, or agricultural buildings and installations including heavy equipment and agricultural equipment...."<sup>442</sup>

In some countries failure by companies to reinvest up to 10% of the profits in the natural resources industry may

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<sup>442</sup>. U.N. Doc. E/CN.14/28 Rev. 2, p.67, Section VI - for Legislation in Tunisia enumerating methods for reinvestments.



increase the liability to pay to 50%.<sup>443</sup> By insisting on a plough-back system, or reinvestment of profits in the natural resources industry, states mobilize scarce capital for development of new industries and the expansion of the existing industries for the exploitation of natural resources. Similarly states encourage reinvestment of at least part of the earnings, both to reduce the foreign exchange outflow and to increase the contribution of the venture to the national economy.

Here again there is no need for excessive rigidity since there are limits to the useful expansion of a given enterprise, as well as to the diversification that can be expected from all but the very large companies. Yet there would seem to be good reason for the requirement included in some investment laws that the investor must present a basic plan of reinvestment and expansion at least for the first few years of the operations. Nevertheless, what is necessary is to formulate realistic tax targets and to keep the tax system in line with the objectives of the plan, as well as with the structural changes which emerge from its implementation.

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443. In Togo, there is a special rule concerning enterprises which have realised more than 1 million CFA over a four year period and are subject to tax under the law. If they fail to reinvest a minimum of 10% of these profits, an increased tax liability of 50% is levied on them. See U.N. Doc. Sales, No. 65, II. K.3, p.66, (1965).

Limited tax incentives designed to favour specific desirable practices (such as allowances for reinvestment profits or for multiple shift plant operations) may then retain a place in a more development orientated tax system, where advances in tax administration will allow these refined tax burden differentials to become fully effective. No matter what form investment takes, the objective is to mobilize capital for effective exploitation and control of natural resources; by adopting such a policy states are exercising their sovereign right over natural resources.

#### B. Custom Exonerations

Initially African states imposed either a low, or no, customs duty on equipment imported for use in the natural resources industry. For example in Art. 3(1-10) of the Algerian Code of Taxes, a number of buildings required in the mines benefit from a tax reduction of 6% (the general rate being 12.8%).<sup>444</sup> In some cases exemption from duty was allowed only where an enterprise had in some way contributed to the successful development of the natural resources industry.<sup>445</sup>

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<sup>444</sup>. Art. 3(1-10) of the Algerian Code of Taxes; a number of building materials enumerated therein benefit from tax reduction of 6% (the general rate being 12.8%); the list in this article is completed in a note 462/463, F/LG.399 of 23rd August, 1960, and circular No. 1 152/F/LG/A/399 of 29th June, 1961.

<sup>445</sup>. In Morocco the whole policy is enumerated in "Plan Quinquennal 1964" - Division of Economic Co-ordination and Planning Ministry of National Economy and Finance, Nov. 1961. The most noteworthy of the advantages accorded by these laws is exemption from custom duties on materials and equipment necessary to the creation or extension of a factory or industry.

Some conditions for granting customs exoneration are quite specific e.g. that any imported products which can be found locally do not qualify for exemption. Equally if a product is found to be competing with the domestic market, it will attract heavy customs duty.<sup>446</sup> The purpose of this is to protect infant domestic industries. These is a legitimate case for tariff protection for struggling infant industries, but its indefinite continuation may lead to the perpetuation of inefficient high cost monopoly production at the expense of other domestic concerns, as well as of foreign investors. Where such incentive tariffs are part of a tax concession package it is therefore best to grant them only for limited, though extendable, periods and subject periodically to full re-examination of the needs and performances of the protected natural resources industry.

On the other hand where the duty imposed approaches the level of that in developed countries, a far reaching provision available for double taxation is also likely to enhance any excess burden that investor may encounter.

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446. Under the Libyan Customs Tariff, duties on the import of industrial machinery and raw materials are generally reduced while duties on products competing with local industry or agriculture are generally increased. See U.N. Doc. E/CN.14/NR28, Rev. 2, p.46.



### C. Double Taxation (Relief)

Under this arrangement (double taxation relief) certain classes of income derived from one country by a resident in another country are (subject to certain conditions) exempt from tax in the former country; these classes are shipping, air transport, and profits. Dividends are exempt from any tax which is additional to the tax charged on the profits represented by the dividends. Where income continues to be taxed in both countries full credit is given by the country of the tax payer's residence for the tax payable in the country of origin of income. In most cases provisions are included for the exchange of information between the taxation authorities of the two countries.

The practice of double taxation relief was well established.<sup>447</sup> In the post-independence period most African states continued with the old practices with certain conditions adapted to the new states.<sup>448</sup> The method of calculation of

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447. Double Taxation Agreements of the United Kingdom of Great Britain Vol. 1, 1969, pp. 67, 249, 275, 459, 597. See also British Tax Encyclopaedia, by John Tabbot and Wheatcroft; 1968, p.279.

448. S. 1964, No. 1401, the Double Taxation Relief (tax on income) Malawi Order, 2nd Sept. 1964. This agreement was signed between the Government of Great Britain and the Government of the former Federation of Rhodesia and Nyasaland, on 25th Nov. 1955. After the dissolution of the Federation of Rhodesia and Nyasaland the agreement was regarded as continuing in force between the Govt. of the U.K. and Malawi. See British Double Taxation Agreements, Vol. 1, p. 460, 1969. See Petroleum Profit Tax Ordinance of Nigeria, 1959, in supp. to Official Gazette no. 26, Vol. 26, 30th April, 1959, p.64, Part. XI.

relief to be allowed for double taxation is always specified in the agreement or tax law. For example in Nigeria the amount of the credit admissible to any company under the terms of any such arrangement must be set off against the tax chargeable upon that company in respect of income and, where that tax has been paid, the amount of the credit may be repaid to that company or carried forward against the tax chargeable upon that company in any subsequent accounting period.

The significance of double taxation is that it relieves the companies of certain hardships that might otherwise accrue from heavy tax in a country in which they operate. It gives an incentive to the companies, thereby promoting investment of capital which itself is necessary for the development of natural resources. Double taxation relief operates between countries that have good trade relations, so in itself it can be another means of encouraging international economic co-operation.

#### VI. Conclusion

When the method of control of financial matters as they are involved in exploitation of natural resources are examined, it will be evident that African states have adopted procedures, which not only facilitate the development of natural resources, but also give states ample opportunity for controlling every aspect. They range from the investment regulation, and promotion - creating a favourable investment climate for

foreign private investors - to scrutinizing every investment to ensure that an adequate distribution of it in a required area.

Apart from accepting such investment terms the investor is allowed to transfer a certain percentage of the profit accruing from it to an extent which will not jeopardise the country's balance of payments and monetary policy. Such a transfer does not exclude levying a tax on the profits of the companies nor a demand that the companies should reinvest a certain percentage of their profit in the host state for the purpose of expansion of new industries.

Notwithstanding the economic benefits offered to various enterprises to enhance their early operation, states impose different financial obligations on companies working natural resources. Such grants of rights and imposition of obligations, and above all the creation of the most advantageous financial situation for the states concerned are proof of the exercise of sovereignty over natural resources.



CHAPTER VINATIONAL AND INTERNATIONAL RESOURCES CONTROL AGENCIESIntroduction

In the previous Chapter, the legal framework of financial control of enterprises in natural resources industry was examined. Apart from this there is another form of control over natural resources prevalent in Africa. This method involves the principle of control, or exercise of jurisdiction, over these resources through various agencies:- national development corporations or state companies, the Organization of Petroleum Exporting Countries, the intergovernmental Council of Copper Exporting Countries and other organisations.

In the pre-colonial period, such a system was non-existent. There were many foreign companies in the colonial period. Most of them were private concerns, in which the governments had shares.<sup>449</sup> The post-independence period saw a different approach by African states - the establishment of autonomous state companies without any shareholding, and the formation

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449. The British Government was the principal shareholder in the Anglo-Persian Oil Company. See Robert Liefman - International Cartels, Combines and Trusts, 1927, pp. 72-74; The French Government through the Bureau de la France d'Outre Mer held shares in the following companies:

Miferma (Mauritania)	Iron 20%
Micuma (Mauritania)	Copper 25%
Semis (Senegal)	Phosphates 50%
Somwig (Niger)	Manganese 20%

See United States of America Bureau of Mines Special Supplement No. 51, 1958, p.3.

of producers' cartels for the unification of policies regarding the exploitation of natural resources. This is so because most of these countries place great hope in the use of their natural resources. They would like it to do more than provide revenue and satisfy domestic demand. This is reflected in a statement made by Moussa Kobaili, leader of the Algerian delegation to the Seventh Arab Petroleum Congress. He said:

"We consider that the time has come to leave the beaten track and study objectively not only fiscal aspects of the petroleum industry but also above all, the part which petroleum can play in the development of our countries. This means re-examining the anachronistic system of concession and taking charge of the exploitation of our resources. That is the only way in which we can freely dispose of our petroleum<sup>450</sup> riches, and use them to attain our national ambitions".

This Chapter will examine the setting up of the national and international agencies and the methods they employ to exert economic control over the exploitation of natural resources. Finally we shall assess how useful those bodies have been in reaffirming economic sovereignty. Since there are many state companies in Africa, it is intended only to use one or two of them as illustrations of a general pattern; however reference will be made to others.

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450. Quoted by Mendlin, *Oil and Politics*, 1975, p.78.

## I. National Agencies

### A. State Companies

One may start this investigation by asking what is really the significance of state companies for the purpose of exerting jurisdiction over natural resources? Does it in any way differ from control over those companies in which the state holds part of the shares, like Shell-BP and Campagnie Francaise des Petroles, which are more indirectly state controlled? The state companies, however, as they emerged in the African attempt to reaffirm economic independence, differ from the companies mentioned above.

The state oil or copper company is a remarkable phenomenon because it is really paradoxical. Usually it does not have a genuine monopoly therefore it is in a competitive position. A state company lacks the initial investment of private capital to enable it to obtain a position in a market dominated by large companies with ample funds, therefore public funds have to be assigned to it.<sup>451</sup> In that case a state company may be said to be an industrial and commercial concern, which has to make its way in a competitive situation, with the interest of the state at heart. For example the Algerian Government

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<sup>451</sup>. For the purpose of carrying out its mission, e.g. Sonatrach-Algerian State Company was given an initial capital of 40 million Algerian Dinars. The amount was divided into 100,000 AD each; all the shares were purchased by the Government. See Monograph published by the Public Relations Department of Sonatrach, 1968, p.20. The Nigerian National Corporation also was initially given a loan or grant by the Government, Decree No. 18, 1971, 4(b); i.e. Mendico, The Zambian National Corporation was given K.25 million, See CIPEC Doc. Inf/82; see also Mendico Mining Yearbook, 1970, p.4.



stipulates the aim of its national state company (Sonatrach) to be the following:

- i. Safeguarding national interest in all industrial phases leading up to, and following after, actual hydrocarbon production;
- ii. Increasing the national potential of mineral wealth by the constant promotion of exploration and development activities of known deposits;
- iii. Bringing together oil and gas plant and other associated or large power consuming industries such as the petrochemical, gasochemical, and steel industries;
- iv. Helping to establish a truly national petroleum and petrochemical industry by promoting the formation of a national technical elite and by integrating Algerian workers into the technological advances being made in the modern world;
- v. Systematically multiplying the points of impact of the petroleum industry on the rest of the economy by creating and taking charge of companies capable of providing all the services required by the multiple and complex activities of the hydrocarbon and hydrocarbon-derivative industries;
- vi. Developing exports under the trade conditions most favourable to Algeria, to its balance of payments, and to provide maximum revenue for its treasury;

vii. Providing a constant power supply for the domestic market under optimum cost and safety conditions;

viii. Cooperating with friendly nations so as to bring about the unity of action needed for reinforcing the bargaining power of petroleum producing underdeveloped countries for harmonizing their interests.<sup>452</sup>

It may be observed from the above provisions that the state or national companies are established as a special means of implementing state policies, especially in the control of natural resources.

No matter how punctiliously foreign companies are controlled the creation of a state company to work natural resources along with the international oil companies shows the need for more than mere control of foreign companies to secure sovereignty over natural resources. A more decisive move is made where the state itself becomes an entrepreneur, sets up the necessary apparatus and uses this to work its way into the system devised by the foreign companies. By this means, states endeavour to combat the backwardness which exists in Africa because of its lack of knowledge of either oil or copper technology. The importance of establishing national companies either in the field of oil or copper was given priority in an OPEC and a CIPEC resolution. The OPEC resolution began by urging

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452. Sonatrach Monograph, op. cit. (note 451) p.12.

that member countries should endeavour, so far as possible, to explore for and develop their own hydrocarbon resources directly.<sup>453</sup> This aspiration has been transformed into practice, hence some African states have embarked on direct exploitation of natural resources through a national development corporation as a means of substantive control.

### 1. Organs of State Companies

The state companies are administered through the following organs: - Board of Directors, a General Manager and his staff.

1. Board of Directors. In most cases the state companies are controlled through a Ministry; but they also have a Board of Directors;<sup>454</sup> which conducts the affairs of the companies. They are usually selected from top civil servants such as permanent secretaries, chief executive officers of the companies, and men with specialist knowledge of the particular resources concerned.

ii. General Manager. Most of the state companies have a General Manager, who is charged with the administration of the companies. Working along with the General Manager is the Secretary<sup>455</sup> whose duty it is to keep the records and correspondence of the companies.

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453. OPEC Resolution XVI 90 - C1-1, 1968.

454. Nigerian Military Decree No. 8, Schedule 1 -(1); Libya Oil 1954-1971, Libya Oil is an undated booklet published by the Ministry of Petroleum.

455. e.g. Nigerian Decree No. 18, 1972, 4(2).



The staffs of the state companies are not civil servants. they are employed by the Board, who determine their salaries and emoluments.<sup>456</sup>

## 2. Legal Status of State Companies

The creation of state companies does not alter the fact that the state has a more general role in legislation and control of natural resources. However the state companies are structured towards strengthening the national economy by means of development, administration and exploitation of natural resources in their various spheres - the distribution of local and imported products in the market. The corporations can sue and be sued in their corporate names.<sup>457</sup> Apart from engaging in exploitation of natural resources in their own right, they can acquire, or take over, all assets, business property, contract rights, obligations, and liabilities of any other companies, firms, or persons, in furtherance of their business.<sup>458</sup>

456. Ibid, Schedule 1(9).

457. Ibid, 3-1(a); Sonatrach op. cit. (note 451) p.21; Libyan Oil (1954-1971) p.17.

458. e.g. By Decree No. 71-64, 71-65, and 71-66, of 24th February, 1971, all assets, stocks share rights and obligations of foreign companies nationalised by the Algerian Government were transferred to the National Company (Sonatrach). The nationalised assets of Union Minière du Haut Katanga were transferred to the Zaire State Company - Gécomines. See U.S. Mineral Trade Note, Vol. 7, No. 9, p.34.

The state corporations have the right to enter into partnership with any company<sup>459</sup> firm or individual. Likewise they have the right to dispose of any property lease and to manage moveable property. They are financially independent in that they have their own budget tailored to the model of other commercial enterprises. With their own finance they can defray their expenses. Above all they are administratively free, keeping away from subordination to government laws, and regulations both their staffs and their organisation. This has enabled such companies to use their initiative in exploitation of natural resources.

It may be added that in some cases the state companies are given a monopoly of transport and construction of pipeline industries. They are also empowered to control the finances of affiliates<sup>460</sup> by approving their budgets, profits and loss account and distribution of, and amendment of, their bye-laws. For the furtherance of their business they can formulate their own programme of training, staffing and safety measures for their own technical staffs.

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459. A Joint Venture Business Operation was included between Government of Libya and the Italian Corporation (AGIP) on 30th Sept. 1972, to exploit petroleum resources. Art. 1 deals with the establishment of the venture; A similar agreement was concluded between Algerian National Corporation (Sonatrach) and Getty Oil Company to explore and prospect hydrocarbon in Algeria on 19th Oct., 1968.

460. Sonatrach Monograph, op. cit. (note 451) pp. 19-20.



It can be seen that the state companies become suppliers of capital, controllers of activities, employers of personnel,<sup>461</sup> buyers and sellers, seekers of supplies and customers, signatories of industrial and commercial contracts. These roles of state companies are in line with state policies for controlling natural resources.

### 3. Functions of State Companies

Another question worth investigating is whether the state companies actually involve themselves in the exploitation of natural resources. Obviously one of the reasons for setting up state companies has often been the non-existence of private enterprise in the oil or copper industries, or their failure to assume the risks that are involved. The function of state companies in such cases is to fill the gap. This is the case in African countries, where, in addition to the role of supplying the required facilities, the state companies have now been given the task of replacing foreign participation in various activities.

There is ample evidence of this practice in the exploitation of natural resources. For example Sonatrach, the Algerian state company, directly controls 100% of the area ceded to it after the state took over foreign property.<sup>462</sup> It controlled

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461. The above Algerian Enterprise had only 3,000 employees at the end of 1967, but the figure rose rapidly to 9,000 in 1970, and at the beginning of 1971 it was 10,000. The number of employees of Sonatrach is far larger than that of the Elf and Eurofep Companies operating in Algeria - See the Statement of the Chairman of Sonatrach, Mr. Chizali, reported in BIP 1677, Sept. 1970, p.3; Medlin, op. cit. note 450, p. 106.

462. Art. 2 of the General Settlement Agreement between Sonatrach and Eurofep 23rd Nov. 1971.



14 permits which covered 50,000 square kilometres in the free area, most of which had been abandoned by foreign companies for technical reasons. It is already acting as a petroleum operator in two blocks, D.1 and D.3, of the operative areas, and for this it had 70 million Dinars between 1966-67; the budget covered drilling of eight exploratory wells and twelve geophysical works.

As a result of these operations of Sonatrach petroleum production in Algeria increased from 26 million tons in 1965 to 38,4 million in 1967. This means that there has been an annual increase of approximately 25% between 1965-67 which is the highest increase in the world compared with 10.5% in the Soviet Union, 9.5% in the Middle East, 4% in the Caribbean, 3.5% in North America and the world average of 7.5%.<sup>463</sup> The importance of this national company in promoting the economic independence of Algeria has been expressed by an oil expert thus:

"Sonatrach must be considered to have begun to have significance at the international level. It is negotiating contracts for the sale of oil to its neighbours in the Maghreb, and to some countries of Western Europe and is gradually extending its exploration to certain Arab states, above all Yemen. In natural gas the Algerian enterprise will soon be firmly established at the international level; in all probability exports to France will develop normally. Shipments to Britain by supertanker are increasing, and

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<sup>463</sup>. Sonatrach op. cit. p.42.

the U.S. authorities have finally agreed to allow the valuable contract made with El Paso (15 thousand cubic metres a year for 25 years). There is such a shortage of natural gas in Europe as well as an even greater one in the United States of America that industrialised countries are unlikely to neglect any source of long term supply".<sup>464</sup>

This engagement in the direct exploitation of natural resources is not peculiar to the Algerian state company; many others have taken the same line of action.<sup>465</sup> The emergence of state companies is the beginning of a new relationship between African states and foreign companies working natural resources in these territories. The establishment of state companies is the only solution for a state wishing to engage in the development of its natural resources beyond the exploration stage. The effectiveness of control of natural resources by the state will be realised more easily if the task is assigned to a special agency, which, though controlled by the state and closely bound by government directives, nevertheless has the administrative autonomy and flexibility of a private enterprise.

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464. Mendlin op. cit. note 450, pp. 106-107.

465. The Zairian Government's state company (Gecomines), created in July 1967, is by far the largest mining company in the Republic. In 1972 the company's exports generated over 80% of Zaire's foreign exchange earnings. In the same year the total sale of all metals was \$503.8 million, and provided \$ 170 million revenue to the national treasury (30% of the total). Zaire-Etan, incorporated as a Zairian Company in 1969, acquired the assets, rights and concessions of Gecomines, its Belgian owned predecessor. The company produced 804 tons of cassilente with a 70% tin content.

It is only states which can guarantee that the resources will be exploited to the full without recourse to restrictive practices. Through their companies states can themselves receive mining rents, and devote them to the purpose of national interest. By delegating the power of exploitation of natural resources to their companies, states have put a stop to groupings of harmful private interests that may exert dangerous pressure on the life of the nation.

Most countries prepare for a rainy day, that is for periods of crisis. Should such a crisis lead to stoppage of work and supply of any products to local markets, by foreign companies, the state companies can act as substitutes. The creation of state companies in this event may be regarded as a reaction to the undue influence exercised by some large companies, or producer countries, occupying a position of politico-economic power as a result of which they were or are in a position to threaten the sovereignty of a particular country.<sup>466</sup> The fear of foreign economic domination was reflected in the speech made by a representative of Chile to

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466. The lesson of Chile is an example - International Telephone and Telegraphs' attempts to persuade other companies, and the U.S. State Department, to enter into a campaign of economic sabotage aimed at preventing the confirmation of Allende as President were a total failure. There is no evidence that ITT got any other companies to support its campaign; upon exposure of the relevant correspondence, there was seen to be virtually unanimous condemnation of the company's methods within the U.S. business community. See the World Today, 1974, p. 396.



the XI Convention of Mining Engineers of Peru, which took place in Lima on November 30 - December 6, 1969; he said that;

"We neither wish, nor shall we accept, to repeat the sacrifices of the past, when the legitimate revenue of our countries were limited, whereas the purchasing countries imposed on us their industrialized products, always at a much higher price."<sup>467</sup>

Obviously where a state company is producing any goods that were previously imported the supply from abroad may be reduced, and the local market is assured of the availability of the given product. Again the impending danger arising from specific groups of countries holding a monopoly or dominant position in a key sector, such as energy, is averted. If there is a failure to act in such a situation, a nation's debts could pile up very quickly, and if such a trend is not brought under control, there will be increased dependence on the few countries whose currencies rule the international market.

The establishment of state companies in Africa is another measure to prevent the opportunity for abuse provided by domination of markets if there are only a few operators. Therefore the use of state companies in the exploitation of natural resources is the African version of the Western Anti-trust philosophy.<sup>468</sup> Its purpose is to provide counter-

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467. XI Convention of Mining Engineers of Peru Nov. 30-Dec. 6, 1969, reported in CIPEC Dec. INFO/89, at p.11.

468. Dr. Frankel has argued that the public enterprise, especially in the oil sector, is the Europeans version of the American Anti-trust philosophy in his "Oil and Power Politics", 1969, p. 159.

vailing measures against an agglomeration of economic and political power in the hands of big international companies. It is the function of state companies to take care of specific matters which are of importance to the nation and which might otherwise be ignored. These include security of supplies, competition in the market and hence the securing of better prospects for the customer; stimulation of private enterprise by challenging its hegemony, reducing the trade gap, and creating the possibilities of a better balance of payments.

However the creation of state companies does not alter the fact that states have a more general role in legislation and control of natural resources. It should be borne in mind that whatever advantage states gain by entering into the natural resources industry as private entrepreneurs an additional bonus is obtained by the exercise of their power to govern events, i.e. economic activities regarding the exploitation of natural resources can be directed and controlled by ministers of the states concerned. In the light of the above, it can be concluded that whether state companies are those of developing or developed countries, they are regarded as a special means of implementing state policies to achieve national economic stability and the realisation of economic self-determination.

## II. International Agencies

### B. Single Interest Organisations/Associations.

#### Introduction

States have taken various steps to ensure efficient management of mineral resources. Among these steps are the formation of economic co-operatives or alliances of producers of a particular mineral with a view to unifying their policies to effect a better return from the product of that particular mineral industry. The interest behind the formation of such associations or organisations is always to strengthen the producers bargaining position, so as to realise high prices, which will help them in other aspects of their development plans.

These types of economic groupings or co-operatives are often found among states, especially the weak developing producing countries - Asia, Africa, and Latin America. For producers of particular minerals, economic co-operation offers them not only the solidarity which they need for joint bargaining action, but enables them to learn from one another's experience of a given mineral industry with a view to improving their position at the global level. Sometimes the association gets for its members what each state cannot acquire for itself acting individually, or singly especially in price negotiations. The above considerations might account for the reasons why African states have joined different producers organisations for various minerals.



### 1. Organisation of Petroleum Exporting Countries (OPEC)

Many authorities have written about OPEC. It was founded in 1960 by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela and has gradually expanded to include African state Oil Exporters of importance - Algeria, Libya, Nigeria and Gabon (as an Associate Member). OPEC was established as a reaction to the oil companies reduction of posted prices for crude oil (the reference price for calculating government revenue) which was itself a response to the slide in realised oil prices in the late 1950's caused by over supply.

OPEC member countries agreed to try to raise prices to the previously prevailing levels and to insist on justification by companies of proposed price changes, to stand together in considering the policies of the companies and generally to unify their petroleum prices policies and determine the best means of safeguarding their common interest. In implementing the above policy African states have co-operated in strengthening the solidarity, the efficient organisation (in fact at the time of writing, the General Secretary is a Nigerian) of OPEC in an attempt to strengthen the economic sovereignty of its member countries which was one of the objectives of the organisation which are described as follows:

"that the members are implementing much needed development programmes to be financed mainly from the income derived from petroleum export;

"that members must rely on petroleum income to a large degree in order to balance their annual national budgets;

"that petroleum is a wasting asset and to the extent that it is depleted, it must be replaced by other assets;

"that all nations of the world in order to maintain and improve their standard of living must rely almost entirely on petroleum as a primary source of energy generation;

"that any fluctuation in the price of petroleum necessarily affects the implementation of members' programmes and results in a dislocation detrimental not only to their economies, but also to those of all consuming nations;

Have decided to adopt the following resolutions;

"that members shall demand that oil companies maintain their prices steady and free from the unnecessary fluctuations, that members shall endeavour by all means available to them, to restore present prices level prevailing before the reductions; that they shall ensure that if any new circumstances arise which in the estimation of the oil companies necessitates price modifications, the said company shall enter into consultation with the member or members affected in order to explain the circumstances.

"that members shall study and formulate a system to ensure the stabilisation of prices by among other means the regulation of production with due regard to the interest of the producing and consuming countries, and to the necessity of securing a steady income to the producing countries, an efficient economic and regular supply of this source of energy to consuming nations, and a fair return on their capital to those investing in the petroleum industry.

"that if as a result of the application of any unanimous decision of this Conference any sanctions are employed, directly or indirectly, by any interested company against one or more of the member countries, no other member shall accept any offer of a beneficial treatment, whether

in the form of an increase in exports or in an improvement in prices, which may be made to it by any such company or companies with the intention of discouraging the application of the unanimous decision reached by the Conference."<sup>469</sup>

From the above resolution it is clear that the main objectives of OPEC are to co-ordinate and unify the petroleum policies of member countries and determine the best means for safeguarding their interests individually and collectively, and to devise ways and means of ensuring the stabilization of prices in international crude oil markets with a view to eliminating harmful and unnecessary fluctuations.

An inference can be drawn from the above objectives that the oil <sup>organization</sup> ~~cartel~~ was not established with a view to creating scarcity of oil supply in the world markets. In other words it was not intended to inflict any economic ills on consumer countries; it is only intended that the consumer countries should be encouraged to look to, and husband, their own resources. In fact this is what the exercise of the principle of sovereignty over natural resources is all about.

Another angle worth examining is whether the oil cartel has succeeded in achieving the above objectives, which are geared towards the economic independence of the member countries. There are occasional conflicts among member countries based

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469. Resolution 1.1.



mainly on their different economic philosophies.<sup>470</sup> Again the oil <sup>Organisation</sup> cartel has not yet existed long enough for its failure or success to be determined. Nevertheless one may deduce that, had the OPEC not been established, posted prices would have probably continued to decline in response to market factors. In this respect the achievements of OPEC in strengthening the economic sovereignty of member countries are noticeable.

The importance of OPEC to the realisation of Economic Sovereignty

Despite the occasional disagreements among members of the oil cartel, it has helped its members to achieve notable gains, and has played an increasingly significant role in the petroleum industry especially in matters relating to petroleum prices.<sup>471</sup>

By pooling the strength of individually weak oil producing countries OPEC attempts to match the economic powers of its "adversaries" and use novel machinery for collective bargaining, so as to reduce the superior bargaining position of the

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470. The difference in the economic philosophy of member countries is very often noticable. For instance the oil cartel passed a Resolution in 1968 against a Japanese firm yet shortly after that a Japanese firm was seen drilling oil in Qatar. See Mekadashi "The Community of Oil Exporting Countries" 1972, p.2.

471. See Guidelines for Petroleum Policy in Member Countries Resolution XVI 90; - See also International Legal Materials, Vol. 7, 1968, p. 1183.

companies to more manageable dimensions. It must however be mentioned that OPEC was not interested in restoring the effective control of its member countries over their natural resources for political reasons. Rather the economic objective of furthering the most efficient and rewarding development of their resources became their dominant aim. Through the oil <sup>Organisation</sup> ~~cartel~~, the producing countries had a chance, for the first time, to determine posted prices. This is an indication of the member countries' consciousness of their rights over their natural resources. It was also a lesson to the major oil companies which had started seeking power by increasing their reserves, diversifying sources of production, and flooding the world market with low cost oil extracted from these reserves. <sup>472</sup>

The flooding of the world market with cheap oil by the companies was much disliked by the producing countries because it was an abuse of their natural resources and undermined their sovereignty. Accordingly, they prevented it by adopting the following methods of dealing with problems related to prices based on a study of oil prices and revenue. No sooner was the producer's oil <sup>Organisation</sup> ~~cartel~~ established that it conducted an

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472. Relative bargaining power of the Arab countries and oil companies in determining the financial conditions in oil concessions, a Report submitted by Sharnky Labib to the Third Arab Petroleum Congress, 1961, p.52.



extensive study of crude oil prices and revenues, and capital investment in oil production. It consulted two established and well known consultancy companies - Arthur D. Little of the United States of America, and Economist of United Kingdom of Great Britain, which conducted studies for them in accordance with the OPEC resolution that:

"in pursuance of paragraph 3 of the resolution 1.1 the Conference having made a tentative study of the prevailing prices, hereby resolves that a detailed study is to be made by the Board of Governors concerning this matter in order to arrive at a just pricing formula, supported by a study of international prorationing, should that prove necessary."

The Arthur D. Little study revealed essential statistical facts<sup>473</sup> concerning the returns on the oil investments of the leading oil companies in some Middle Eastern countries and Venezuela. These facts gave the oil producing countries an insight into the price system and the previous company practices.

#### Establishment of New Price Structure

The OPEC resolution IV;32 of April, 1962, drew attention to specific methods which member countries should follow to restore the prices of crude oil to their pre-1960 level.

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473. The Report revealed that during the four years, e.g. 1956-1960, of the creation of OPEC, the rate of return on net assets was 71% in Iran, 62% in Iraq, 14% in Qatar, 61% in Saudi Arabia, 20% in Venezuela. See OPEC Bulletin 1973, p.11.



In this approach the conference recommended to the members of OPEC that they should negotiate with the oil companies with the aim of ensuring that tax payments on the basis of posted prices were not lower than those prevailing in 1960. To strengthen the resolution the OPEC member countries adopted the following further resolution which was addressed to any company which might fail to comply with the OPEC members' request:

**"If within a reasonable period after the commencement of negotiation no satisfactory arrangement is reached, the member countries shall consult with each other with the view to taking such steps as they deem appropriate in order to restore prices to the level that prevailed prior to August 1960."**

The above threat is so vague that one may wonder whether it would have had any effect at all on the companies' practices.

The mere fact that producing countries abandoned the above resolution and focussed attention on more realistic issues such as royalty and the expansion of market allowances is evidence that the members of OPEC are determined to pursue every avenue which will yield to them the maximum economic benefit. Hence an element in the price structure was the linking of the crude oil prices to the prices of imported goods from member countries.<sup>474</sup>

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474. At the Fourth Arab Petroleum Congress held in Beirut, OPEC presented a paper, the theme of which was "The Price of Crude Oil: A rational Approach". The most significant part is paragraph 4 which reads:  
**"In determining the level of posted prices, these prices should in one way or another incorporate provisions to compensate for increases in the prices of manufactured goods imported by oil exporting countries".**

Demand for a System of Prorationing

When the oil companies opposed the price raising system on the pretext that it would affect the factors of demand and supply in the market, the OPEC member countries adopted the idea of strengthening prices by absorbing surplus supply or excess production capacity through the programming of production by prorationing production.<sup>475</sup> This idea was sponsored by Venezuela. It was thought that the best way to approach the above system was by formulating a joint production programme for the OPEC member countries to meet the increase in the world demand and this plan was to be submitted to members for approval.

There may be economic advantages in prorationing but one should not overlook the difficulties inherent in pursuing such policies. The most obvious is that member countries have different economic needs, which no doubt play an important role in their oil policies. Equally significant is the disparity in the oil reserves of member countries. It is therefore very unlikely that prorationing of production will be strictly adhered to by the producing countries. In the opinion of the writer, prorationing will not produce a lasting effect in achieving economic sovereignty.

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475. The OPEC Conference held in Libya decided on a joint production programme, Resolution X 6.3, 15 December, 1965.

Control of Discount by Small Oil Companies

The OPEC observed at one time that the downwards trend in price in the world oil market was due to the practices adopted by private oil companies, which were determined to make their presence felt in the market, or rather to promote their sales through discounting prevailing oil prices. Since 1965 the OPEC member countries have protested against sales of oil at discount prices, because it affects not only the economic stability of member countries but also the standard of living of their citizens.

When Libyan Government confronted the independent oil companies, which operated in Libya and had also been discounting the prices which the Libyan Government ought to receive for its crude oil, the Government of Libya received the support of OPEC member countries.<sup>476</sup> The confrontation of the independent oil companies by the OPEC member countries ended in resolving that no member countries should grant any petroleum licence, or enter into economic development agreement with independent oil companies for the development of new resources, except where such arrangements embodied taxes and royalties calculated on the basis of posted price.<sup>477</sup> The effectiveness

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<sup>476</sup>. Ibid.

<sup>477</sup>. OPEC Resolution XI, 72, 25th-28th April, 1966.



of the stand of OPEC member countries on this issue could be seen by the companies subsequent adoption of payment of taxes on the basis of posted prices.<sup>478</sup>

The importance of OPEC in the petroleum industry is differently assessed by experts. Some experts belittle the impact of OPEC and thus attribute developments in the petroleum industry to external factors not directly related to the organisation. Others tend to magnify its role. Certain individuals may sometimes be found making different statements at different times. For example, Professor Edith Penrose, an expert in petroleum economics, in one of her lectures said that:

"With the establishment of OPEC the bargaining power of crude oil countries vis-a-vis the oil company increased tremendously".<sup>479</sup>

Yet in another lecture, she is reported to have said:

"despite its studies, public relations, influence and presence in all concerns of the world, OPEC was not an important factor in the change that occurred in the petroleum industry during the past ten years or which may happen in the future."<sup>480</sup>

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478. Rouhani, op. cit., pp. 208-209.

479. Professor Edith Penrose, "The Role of Major International Firms", a lecture delivered in Cairo in 1968 and published as a supplement to the Middle East Economic Survey, 2nd August, 1968, p.10.

480. Professor Edith Penrose, "OPEC and Changing Structure of the International Petroleum Industry", a lecture delivered at the American University of Beirut in March, 1969, and published as supplement to the Middle East Economic Survey, Vol. 7, 1969, p.5.

Professor Penrose might be correct in both her assessments depending upon the angle from which she based her conclusions. Apart from that, one thing seems obvious. It is only after the establishment of OPEC that the big oil companies have realised that they are facing a union of enlightened and business-minded host countries determined to make optimum use of their resources.

For a legal assessment of the role of OPEC, one question seems particularly pertinent. Can OPEC, as an international organisation, make a binding decision for the member states? The answer to the above question can be found in Art. 2(a) of the Statute of OPEC, which specifies the aim of the organisation as that of acting as co-ordinator of member states policies, and as a determiner of the best means of safeguarding them. In which case whatever decision the organisation might make is subject to the policies of member states and their ratifications; without which such a decision is not binding.

In the light of the above reasoning, it may be said that the achievements of OPEC depend mainly on the individual member states of the Organisation, rather than OPEC as an independent international organisation as such. However this does not rule out the importance of OPEC in harmonisation of member states' petroleum policies.

## 2. Conseil Intergouvernemental des Pays Exportateurs de Cuivre (CIPEC)

CIPEC was formed following the ministerial meeting or conference of the Copper Exporting Countries which met in Lusaka in June, 1967,<sup>481</sup> and was attended by representatives from Chile, Zaire, Peru, and Zambia, and observers from Botswana, and Uganda. Its headquarters are in Paris. CIPEC consists of four Organs:

- i. The Conference of Ministers
- ii. The Governing Board
- iii. The Executive Committee and
- iv. The Copper Information Secretariat.

The founder members are Chile, Zaire, Peru and Zambia.

It was stated at the CIPEC Conference in Lima, that Australia, Indonesia and Papua New Guinea were to be admitted as members;<sup>482</sup> while other copper countries expected to send observers included Canada, Iran, Bolivia, the Phillipines, Mauritania, Uganda, Yugoslavia and Malaysia. Apparently the distinction between producers was based on the fact that the founder members were keen on looking for states with identical convictions; who would also fight together in solidarity to improve their bargaining power. In fact one of the ideas of inviting many

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481. CIPEC Doc. Info.157/Appendix 2.

482. West Africa, 17th Nov., 1975, p. 1384; See also CIPEC Doc. CM/37/74, Art. 2, for the conditions of membership.



countries as observers was to enable them to study the objectives of the organisation, make up their minds, and join the copper organisation.

The first conference at which the four founder members met ended in the signing of an agreement, the preamble to which sums up the signatories concerns as follows:

"recognizing the exceptional importance of copper to their economies;  
considering the need to prevent excessive fluctuations in the price of copper for both producers and consumers;  
believing that this situation can be improved by increased cooperation and concentrated action by copper exporting countries;  
conscious of the importance of implementing the findings of the intergovernmental Copper Conference held in Lusaka, Zambia, from 1st to 8th June, have agreed as follows:

to set up a consultative intergovernmental Organisation to be known as the Intergovernmental Council of Copper Exporting Countries (CIPEC)

There is no doubt that fear of price fluctuation was the main reason for forming CIPEC. This is brought out in Art. 1 of the agreement, which stated among other things that the objective of CIPEC was as follows:<sup>483</sup>

1. to coordinate measures designed to foster, through the expansion of the industry dynamic and continuous growth of real earnings from copper exports, and to ensure a real forecast of such earnings;

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483. The Agreement is contained in CIPEC Doc. CM/37/74 Art.1.

ii. to promote the harmonization of the decisions of, and policies of, the member countries problems relating to production and marketing of copper;

iii. to obtain for member countries better and more complete information and appropriate advice on the production and marketing of copper;

iv. in general to increase resources for the economic and social development of producer countries bearing in mind the interest of consumers;

v. to promote the solidarity of the member countries concerning the problems faced by these countries in the copper industry;

vi. to promote the coordination of their policies with other organisations of the same type as CIPEC.

The effect of the above measures was to provide a legal focus for solidarity in CIPEC at the precise time when unity over a joint economic policy on copper production was undergoing strain. Copper price had tumbled during 1970 and were to remain depressed until 1973. It is suggested that measures against price fluctuation were therefore embarked upon in order to strengthen economic sovereignty.

Where price fluctuation is not prevented, the economic sovereignty of CIPEC member countries may be undermined. This is so because the copper industry is the biggest foreign

exchange earner in those countries. With a fall in the price of copper the development plans of such states will be frustrated. This may have adverse effects not only on importing capacity and balance of payments, but may also reduce the standard of living in those countries. In this connection it can be said that economic independence constitutes a means and not an end towards which all efforts must be directed. Economic independence in such cases necessitates control of the source of economy (copper price). This is the only way to preserve economic sovereignty.

#### A. Structure

For the achievement of the objectives of CIPEC, the agreement established the organisation's structure in the form of four Organs.

#### The Conference of Ministers. <sup>484</sup>

This Organ is made up of ministers from each of the member countries. It is also the highest organ in the copper organisation (CIPEC). It holds ordinary meetings or sessions once every two years. An extraordinary conference can be held also within that time, but must be approved by 50% of the member countries. The location of the ordinary conference is established by the agreement of the member countries and each conference fixes the date and place of

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484. Ibid, p.2.



the next. The location of the extraordinary conference is fixed by unanimous agreement. The significance of the conference is that it is the only forum in which each minister presents the problems of his country as it falls within the competence of CIPEC.

#### The Governing Board<sup>485</sup>

The Governing Board is made up of delegations representing the member countries. The head of each delegation must hold a high level position in his country with responsibility for the formulation or implementation of government policy for the copper industry. The Governing Board is responsible for the coordination and submission to the governments of the member countries of individual and collective measures concerning the copper industry, including production processes, expansion of consumption and any other measures tending to realise the objectives laid down by the conference under the direction of which it acts.

It attempts to implement technical and administrative cooperation between the member countries to develop human resources in technical, scientific, and administrative fields and to find solutions for personnel problems, as well as other problems posed by the copper industry. The Board is intended to harmonize the positions of the member countries

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485. Ibid, p.7, Art.8.

in international meetings as far as the production and marketing of copper is concerned. Its ordinary meetings take place whenever necessary and at the request of 50% of the member countries. Evidently the Board's action is geared towards promoting members goals for achieving better terms from copper production, which in turn is necessary for the achievement of economic sovereignty.

The Executive Committee <sup>486</sup>

The Executive Committee is made up of one permanent representative from each country. In effect the representative must be a citizen of the country which he is representing. This is the only way a check is conducted to see that any person attending the meeting has the interest of the copper <sup>Organisation</sup> ~~at~~ at heart and leaves no room for persons or representatives who may reveal the copper cartel's secrets or strategy to the other party i.e. the foreign companies producing copper. A simple majority of the representatives is sufficient for convening meetings and making decisions. The Executive Committee functions under the direction of the Governing Board, and has responsibility for coordinating and submitting to member countries all measures related to the copper market - production processes, increases in consumption and all measures for the realisation of the objectives fixed by the Governing Board.

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486. Ibid, p.8, Art. 12.

The Executive Committee is responsible for the supervision and evaluation of the functions and studies of the Secretariat and it decides upon the technical studies to be undertaken and is responsible for the distribution of the reports and conclusions to the respective governments of member states. This is one of the forms by which actions to implement sovereignty over copper resources is coordinated, so that each member takes advantage of the others' strategy, where it proves successful in dealing with the companies.

The Copper Information Secretariat.<sup>487</sup>

The Secretariat is a permanent organ of CIPEC; its headquarters are in Paris, and it is under the direction of the Executive Director. Its staff members are international functionaries, and the official languages are English, French, and Spanish. The Secretariat supplies information to the member countries concerning copper consumption and production by means of studies on demand structures, trends, substitute productions, new copper uses, forecasts of future demands, expansion programmes for presently existing mines, new production projects, scrap offers, evaluation of reports on supply and demand, marketing operations, stock movements, sales, contract forms, copper market prices, information on international agreements, tariff quotas, production, subsidies, and strategic

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487. Ibid, p.8, Art. 15.



reserves, technical advances in extraction, treatment and the uses of copper, factors concerning the labour force, transport, and other elements relative to the economy of the copper industry, and concerning all problems related to the market for, and marketing of, copper and copper semi-products.

Previously, i.e. before the existence of CIPEC, there was no such coordination among member countries. In fact most of them knew very little, or nothing, about the industry. The best knowledge was possessed by the companies. This lack of knowledge of the copper industry obviously put the host countries at a disadvantage. With the establishment of CIPEC and its Secretariat, where every aspect of copper industry is studied and members informed about all they should know about their economic mainstay, they (the host countries) can now bargain, and seek the most advantageous economic benefits they can realise from copper production. It is only a thorough knowledge of the industry that makes it possible for the host country to exert effective control, and effective control of copper resources and their exploitation are the prerequisite to economic sovereignty.

The fact that thorough knowledge of the working of any industry is necessary for effective control is demonstrated by the CIPEC special committees:<sup>488</sup>

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488. Ibid, p.4.

Committee on Marketing

This Committee is charged with the implementation of a marketing policy. For CIPEC to fight against price fluctuations it must have a marketing or price policy, without which it cannot counteract its opponents, the foreign companies engaged in copper production. Knowledge of market operations enables member states to know when to demand more or less in pricing their products.

Committee on Production and Investments

This Committee is charged with the responsibility of coordinating the action of the state corporations concerning supplies, engineering, projects, technical investigations, and training of personnel.

Such exchange of views among the members makes unification of action possible. Where members have unified action it becomes difficult for companies to take advantage of their disunity. Again there is more chance of success when members act jointly and collectively in every aspect of the copper industry, especially in matters concerning development and capital investment. It will equally be appreciated by companies if members have a specified policy. This clears away any fear of uncertainty and harmonizes foreign investment as well as promoting the attainment of economic independence.

The financing of the Copper Organisation is the collective concern of its member countries. As regards financing the

Copper Cartel, the Executive Committee is responsible, on advice of the Executive Director,<sup>489</sup> for preparing an annual budget. A budgetary statement is submitted to each representative on the Governing Board not less than thirty days before the date of the meeting at which the budget is approved. The meeting usually takes place not later than 30th November of each year. The budget is in most cases approved by the Governing Board and such approval constitutes the authorisation of the Executive Director to incur obligations and make the expenditure which it envisages. In exceptional circumstances a supplementary budget is submitted by the Executive Committee to the Governing Board.

The contribution to the annual budget is paid in freely convertible currency into CIPEC's bank account in two equal instalments, (which are usually due in January and July of each year). When a member fails to pay its full instalment to the annual budget within sixty days of the date on which the instalment is due, its voting rights on all organs of CIPEC are suspended until the instalment has been paid. Any member whose voting rights have been suspended under the CIPEC agreement nevertheless remains responsible for the payment of its contributions.<sup>490</sup> At the end of each financial

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489. Ibid, p.12, Art. 26.

490. Ibid, p.13, Art. 28.



year, the Governing Board usually publishes the receipts and expenditure of the Organisation.<sup>491</sup> Contribution to the purse of the Copper <sup>Organisation</sup> is necessary because without finance, it cannot maintain the Secretariat and other Organs whose functions are vital to realisation of the economic sovereignty of member countries by acting together as a team.

Membership of CIPEC is not perpetual. Any member can withdraw at will. However none has yet withdrawn. It seems that each member is satisfied with the objectives. Although no state has resigned its membership there is a formula laid down that any member country that wishes to withdraw its membership must give this intention in a written notice. Such notice is to be submitted to the Executive Director, who should then circulate the information to other members.<sup>492</sup>

Most probably members consider it wise to remain in CIPEC because they can then exert influence collectively rather than individually when negotiating with the foreign companies. Any indiscriminate withdrawal or resignation may to some degree undermine their objectives thereby offsetting the overall plan to achieve economic sovereignty which under normal circumstances would be promoted by acting jointly in a well organized body such as CIPEC.

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491. Ibid, Art. 29.

492. Ibid, Art. 30.

CIPEC is an organization of sovereign states whose main idea is to get the best economic benefits from their natural resources. The fact that they are acting collectively does not in any way affect their sovereignty, rather it strengthens each individual country's effort to control its natural resources and thereby attain economic sovereignty.

#### Achievement of CIPEC

The impact of the Copper Organisation is more noticeable in individual member countries than on the international plane. Individually the founder members have made tremendous efforts to achieve economic sovereignty. This effort took various forms - from nationalisation of foreign copper companies<sup>493</sup> to participation in exploiting copper resources.<sup>494</sup> Equally important is the fact that most members have modified their mining legislation in order to include various clauses, which will enable them to realise the objectives of the Copper Organisation.<sup>495</sup>

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493. CIPEC Doc. Info/53, p.1.

494. Ibid, Appendix 1.

495. E.g. the Mining Law of Peru was amended by the Decree No. 18 225 of 4th April, 1970. The main modifications and innovations contained in the new law are as follows:  
i. Marketing of metal after the transition of 18 months thus assuming direct control of marketing of metals through the State Company (Empresa-Minera du Peru). Copper is now sold at Peruvian producer price. The State has also contemplated refining metal itself.  
In Zaire there have been great changes. Apart from the state take-over, which occurred in January 1967, new mining laws have been enacted to replace the Belgian mining law of 1937. See CIPEC Doc. CO/11/68, Appendix III, for the summary of new Zairian Mining Laws of 1967.

The Copper Organisation is also trying to exert influence on the international plane. CIPEC member countries demonstrated their solidarity in 1973 when the Rhodesian Government closed its frontiers with Zambia. CIPEC member countries regarded the Rhodesian measure as economic aggression (against the main transport route for Zambian copper exports) and enumerated strategies whereby the CIPEC members would fight jointly any assault on the copper interest of member countries by undertaking the following measures:

- i. severance of contact with the aggressor by other member states;
- ii. refusal to sell copper to a buyer who has in any way acted against any member country;
- iii. joint sales policy;
- iv. channelling of economic aid to the victim by the CIPEC member countries.<sup>496</sup>

One may conclude that by coordination member countries will be able to use more effective sanctions against any person, government or company which may threaten to undermine any of the members target for the realisation of their economic sovereignty.

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<sup>496</sup>. Financial Times, 2nd February, 1973, p.8.  
See also CIPEC Doc. CM/37/74, Fin. 2.



One can appreciate the need to attain economic sovereignty at the international level by developing the solidarity of weaker producing countries, but what casts doubt on CIPEC's future success is whether its member countries can successfully maintain the same cohesive policies as OPEC. The main factor is that both copper and oil have peculiar characteristics, that is to say, copper producers differ from oil producers in that the former have proportionately much greater difference in production costs and face a pool of potentially reusable metal i.e. the metal already used, in the hands of their customers. This does not undermine the exercise of sovereignty over this resource, but it does indicate that in contemplating certain lines of action, the nature of the resource must be taken into consideration.

#### Action with regard to Prices

The location of CIPEC in Paris, which is near London, is an advantage for it can keep an eye on the price trend of the London Metal Exchange Market; if necessary and possible enables it to intervene. However unlike the International Tin Council, CIPEC has not yet sought to influence prices. This is apparent from the situation that developed at the end of 1970, when copper prices fell to £420-430 in London (i.e. 40% lower than at the beginning of the year). A CIPEC Conference of Ministers ended in confusion following conflicts of views and contradictory statements by the Chilean and

Peruvian Ministers.<sup>497</sup> However, the awareness of CIPEC member countries of their dependence on copper has since made it necessary for them to formulate specific policies relating to intervention in the price trend.<sup>498</sup>

To achieve the above objectives various actions have been recommended to CIPEC. They are as follows:

i. the establishment of a control system similar to that of the International Tin Agreement i.e. stock piling 10% of primary production (equivalent to the tin buffer stock) would represent at least £536 million (at a low price of £450 per tonne). It is inconceivable that the Organisation should bear such an outlay alone. Therefore other bodies must inevitably be approached for finance, such as the World Bank or the International Monetary Fund (IMF). It is also suggested that cooperation with other copper producing countries would be necessary. Any action by CIPEC alone would result in subsidising the big Copper International Corporations. The same may happen with any controls on exports or any other stock-piling scheme.

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497. Ibid, Doc. Info. 157 Appendix 6.

498. In April 1975 the CIPEC member countries cut down production by 15%; the cut back was geared towards increasing copper price. See Mining Journal, 11th June, 1976, p. 475.

ii. The elimination of the London Metal Exchange from CIPEC transactions, which would place in issue the relations between any CIPEC producer price and two other prices - London Metal Exchange, and the U.S. price.

The existence of CIPEC, the London Metal, and the U.S. prices in the same market would raise problems for both producers and consumers and is contrary to good economic theory and general business practice. If supplies are normal, then CIPEC's cannot be the lowest price, since, if it was, then demand for copper at this price would increase. This would in turn lead to a drop in demand for metal at the other prices, and thus to a drop in demand for these prices (at least in that of the London Metal Exchange Market). Moreover the developing countries (the Copper Cartel, CIPEC) anxious about the level of their revenue would not want to lose the advantages of the difference between prices. Likewise the CIPEC price could not be the highest, since part of the demand would then turn towards London, thereby making the prices there rise to an equal or higher level than that of the CIPEC price.<sup>499</sup>

This line of argument, in the opinion of the writer, shows why CIPEC, the International Copper Companies', the U.S., and the London prices must vary in the same direction

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499. CIPEC Doc. CM/37/74, Fin. 2, Appendix 6,7,8,9.



by the same amount, even if under certain circumstances (a shortage of metal in particular) these prices are temporarily separated.

The London Exchange, which is subject to the daily pressure of speculation, plays a particularly unsettling role in a market on which the CIPEC countries would like to enforce their producer price. The importance of the Exchange is attributable to the transactions which take place there. If no transactions were effected there and producer prices were to be found, then the London Metal Exchange would disappear, and with it this element of uncertainty. The establishment of a producer price outside the U.S.A. would become possible. For this it would be necessary to obtain the cooperation of consumers by drawing up contracts with them directly at the producer price, and also that of International Copper Companies, who sell via the London Metal Exchange, or at its price, which includes in fact practically all of them.

Further the writer is still of the opinion that the CIPEC member countries are still not capable on their own of controlling the copper market. Any fixing of the producers' price must be in collaboration with the big copper producing companies; such cooperation does not affect the sovereignty of CIPEC member countries. It only facilitates the realisation of maximum benefit from the copper industry to member countries.

### 3. International Bauxite Association (IBA)

Like OPEC members the Bauxite producers want to unify their policies with a view to getting the maximum benefit from the industry. Accordingly a meeting of bauxite exporters was held in Belgrade in 1973, and a draft agreement was drawn up for the establishment of an Inter-governmental Bauxite Association. Consequent to the agreement, the International Bauxite Association was established at a further meeting in March, 1974, in Conakry, Guinea, attended by the Caribbean producers, Guinea, Sierra Leone, Yugoslavia and Australia.<sup>500</sup>

Addressing the conference, the President of Guinea (Seketoure) summarized his policy aspiration for the producers.<sup>501</sup> He called for the creation of an international Association, the adoption of a policy of local processing and achievement of solidarity so as to extend help to those producers who did not possess the means of processing. As far as consumers were concerned the industrialised nations should continue to obtain a raw materials supply system on fair terms, but he stressed that producers called upon to maintain the raw materials supply system should take as their criterion of fairness the mutuality of advantage gained from the system by both the producers and consumers.

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500. African Research Bulletin, Economic, Financial and Technical Series, 15 Feb-14 March, 1974, p. 3027.

501. Guardian, 8th March, 1974, p.17.

Most likely the Association will grow stronger on the basis of its discussions, shared concepts, and information and the issue of orchestrated demands for better tax and price terms and more indigenous processing. It must be said that the prospect for Bauxite producers emulating the peak of OPEC achievements in jointly controlling production, increasing prices and negotiating participation would depend on many factors; firstly the ability of producers to agree on a common front without having opposition within the camp; secondly agreement on a method of controlling production; thirdly a relative consumers' response, and fourthly whether or not action by other resource producers, along the same lines, was proceeding simultaneously, by accident or plan.

An instance of the apparent difficulties can be seen in the inability of the Bauxite Association to agree on a single minimum bauxite price formula, when its council of ministers met at Kingston, in Jamaica.<sup>502</sup> At that Conference it was agreed that members should fix their 1976 price on the basis of a standard minimum price policy. However the council of IBA approved the selection of a base, or standard, grade bauxite to be used in the determination of a future bauxite price and approval was also given to a method by which variations in price would be agreed to cover differences in

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502. Mining Journal, November 28, 1975, p.405.



qualities of ore.

There is no doubt that the price-fixing of bauxite could be effective if the five main producers so agreed. But this would probably be a weapon of last resort failing agreement on improved prices, the location of processing plant, and other productive joint ventures; it would be a weapon of much decreased effectiveness. Assuming a delayed market price response to hypothetical production cuts, the ability of the producers to sustain the lost revenue would vary widely as between Australia, the Caribbean and African members. The length of delay in price response would reflect the ability of consumer country economies to readjust consumption and bring forward scrap supplies or alternative materials.

The above reasoning does not disapprove of the formation of the Bauxite Associations, as a means of unifying the policies of the producing countries, but it suggests that in framing the control policy certain factors should be considered.

#### 4. International Iron Ore Producers Association (IIOPA)

Although somewhat overshadowed by the developments concerning oil, copper and bauxite, African producers of other commodities are also increasingly urging co-operation. This is true of the iron ore producers association. In order to establish the Association, a meeting of 11 nations (the main producers) was held in Geneva in April, 1975, attended

by Algeria, Australia, Brazil, Chile, India, Mauritania, Peru, Sierra Leone, Sweden and Tunisia.<sup>503</sup>

These 11 nations accounted for 270 million tonnes of iron ore output in 1974, which represents about 33% of global production. The rest is accounted for mainly by the U.S. and France. It is very likely that the membership of the Association will cover the Western world's iron production.

The Association's prime aim is to provide a forum for the exchange of views, between importers and exporters, and to be a centre for the collection and analysis of data on production, exports and marketing of iron ore on a world wide basis. The headquarters of the Association is at the moment in London.

Evidently the formation of an organisation by producer states with aim of controlling a particular mineral resource is now popular among both developing and developed states to the extent that one can say that it is now an accepted approach to the exercise of sovereignty over natural resources.

##### 5. International Phosphate Producers Association (IPPA)

The changes in supply and pricing policies introduced by the oil exporting countries have encouraged a tougher and less compromising attitude in other producers of raw materials in developing countries. This is particularly obvious among Phosphate rock suppliers. The strength of developing country

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503. Mining Journal, 11 July, 1975, p. 21.

phosphate rock producers at present lies in the fact that they alone are able to meet the world-wide increase in import requirements. Although the U.S. and U.S.S.R. are the two largest producers of this rock in the world, accounting for 60% of global production, the output of these countries is presently earmarked for their own domestic market.<sup>504</sup>

The above situation leaves Morocco, Tunisia, Togo and Senegal as the only countries able to increase the export of phosphate rocks. The principal beneficiary of high phosphate rock price was Morocco in 1974; she received an estimated revenue from phosphate of \$ 1000 million in 1974 compared with only 250 million in 1973.<sup>505</sup> The realisation that such high prices can be obtained is an incentive to those African producing countries gearing their efforts towards closer co-operation, in order to strengthen their economic self-determination.

#### 6. International Association of Mercury Producers (IAMP)

The management of natural resources on the global level - through an association of weak developing and developed countries is becoming another state practice in the control of natural resources. A typical example of such an association can be found among Mercury producers, which include Algeria, Spain, Italy, Mexico, Turkey, Yugoslavia. Very surprisingly at the first meeting of Mercury producers in Algeria, they

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504. Mining Journal 28th June, 1974, p. 537.

505. Ibid, p. 518.



decided to sell Mercury at prices below \$ 350 flasks f.o.b.

It is not intended to discredit any association because it tries to get for its members the best price in the market; but one criticism does seem to be pertinent. For an exercise of control to be effective the producers must study the relative importance of their products, before imposing any particular legal regime. For example, the market for mercury does not favour the maintenance of higher prices. Producers are known to have substantial stocks with holdings in Italian hands alone put at more than 50,000 flasks. Even with prices at their present level there has been little sign that demand is growing stronger, though there could be temporary improvements as buyers take advantage of the relatively low price market. The fundamental problem for the producers is that there is no shortage of metal to underpin a free market. However in the long term, the producers could exert a stronger control over the level of supplies to the market, and the decision of Algeria to convene a meeting to form a producers association could be a first step in this direction.

Significantly Algeria, an African country, is the third largest producer after Spain.<sup>506</sup> But the above position is now changed by the West Sahara dispute. Spain has lost the phosphate to Morocco and Algeria is at loggerheads with

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506. Mining Journal, 24th May, 1974, p. 405.

Morocco over the phosphate in Western Sahara.<sup>507</sup> This position does not seem to be good for IAMP for the present.

C. Study Groups

1. Tungsten

53% of the western world supply of tungsten comes from 11 mines, all of which have considerably depleted total reserves,<sup>508</sup> and some of which have only short remaining lives. Output from small mines making the remainder of the world supply was also seen to be declining. The reliability of supply was also in question due to the possibility of withholding of critical supplies from the non-U.S. sources as political weapon, and interruption in production due to increasing expropriation of mines owned by national corporations, and lack of indigenous skills.<sup>509</sup>

With the above difficulties in mind the primary Tungsten Association held a series of meetings in Geneva to seek consensus on pricing policies, and access to markets. In order to accomplish the above task, a UNCTAD study group recommended talks on the feasibility of creating an international Tungsten agreement. In 1972 6% of the world trade in Tungsten ores and concentrates came from developing countries - Bolivia, South Korea, Thailand, Brazil, Peru -

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507. Ibid, 6th Feb. 1976, p. 93.

508. Time Magazine, Feb. 9, 1976, p. 19.

509. Mining Journal, 23rd March 1976, p. 325.

the rest comes from the EEC, Japan and the U.S.A. African states are actively participating in the discussions of the study group.<sup>510</sup>

The study group has presented its report based on intensive ad hoc intergovernmental consultations on Tungsten. Among other things the group stated that it was:

"important to undertake as a matter of urgency an in-depth examination of the special characteristics of the tungsten market and of the feasibility of alternative effective measures for bringing about greater price stability, and a growing level of supply and demand".<sup>511</sup>

In Part I of the report, the study group presented its own tentative assessment of the considerations relevant to the formulation of price stabilization measures for tungsten and the possible alternatives. This is intended to provide merely a starting point for discussion since it would be for state governments, taking into account all factors which they consider relevant, to reach conclusions on the question of the feasibility of alternative measures for bringing about price stability in the world market for tungsten.<sup>512</sup> The bulk of the report was given over to an account of those technical and economic characteristics of tungsten and the tungsten market which appear to be essential to the achievement of the objectives of states. It was also concerned with

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510. TD/BC1/Tungsten/3, 1st August, 1975.

511. See Report of Committee on Tungsten, 7th Session, 29th Oct. 1973, TD/B1/143 - TD/B/C1 Tungsten, paragraph 29.

512. TD/B/C1 Tungsten COMM/WG, p.3, 25th June, 1974.



the feasibility of price stabilisation measures for the tungsten which again is a main concern of the primary Tungsten Association.

When closely examined member states of the resources associations and the study groups differ in many things - politics, religion, geography, economic strength, and development status. Yet there are certain things easily recognizable as being of common concern among them, such as increased national ownership and control, increased revenue, increased processing and so on. The tactics to increasing bargaining power by forming associations has been learned by all concerned, and each association is aware of the existence of the others, and their relevant activities. In Africa where almost every state is disposed towards planned economies the special role of natural resources industries, as being usually the most important sector of the economy, and at the same time, one based on wasting assets, necessitates a similarity of planning policies and the formation of associations.

### III. Legal Status of International Organisations/Associations

Most of the International Organisations are inter-governmental combines with specific economic objectives. They are not supranational organisations with powers enforceable directly in the territories of member states. They can neither be classified as international commodity agencies within the definition of the Economic and Social Council Resolution 30(iv)

of 28th March, 1947, nor within Art. 54 of the Havana Charter of 1948, which provides for the participation of both producing and consuming countries in relation to a specific commodity. However study groups do not fall into the above category; for example the UNCTAD study group for Tungsten is made up of producers and non-producers.

The international organisations, except the study groups, may be better seen as an economic alliance with the object of ensuring for their members better bargaining terms. Hence they employ every possible avenue open to them to consolidate economic sovereignty over this aspect of natural resources on the basis of collective bargaining. They have legal personality. This is evidenced by the powers given them for their purposes, membership and respective functions.

Most of the international organisations are recognised by the United Nations Economic and Social Council (ECOSOC), the United Nations Trade and Development (UNCTAD), and the Organisation for Economic Co-operation and Development (OECD). Apart from this, contacts are maintained officially with the following bodies: International Bank for Reconstruction and Development (IBRD), United Nations Industrial Development Organisation (UNIDO), The London Metal Exchange (LME) and the United States of America Bureau of Mines.

The employees of some of the organisations, for example OPEC and CIPEC, have international status - i.e. are international civil servants answerable only to the organisations, not their respective state-governments.

If it is remembered that there are various ways in which countries or states exercise jurisdiction over their natural resources, the purpose of forming an economic alliance by African states with other developing and developed countries will be understood. In international law it is within the right of every state to engage in any form of association, or even to limit its sovereign rights by concluding treaties. This comes within the principle of international law relating to the right of every state to decide its political status, including its economic and trade relations.

The desire to attain economic independence has necessitated the adoption of many control schemes, under which the production and distribution of resources have been organised on the national and international scale. The primary purpose of such control schemes has been to stabilize prices in the markets and to guard against the fluctuations likely to occur under free market conditions. The African countries have achieved success in the above objectives through the establishment of state companies and alliances with other weak developing and developed producing countries to form producers organisations or associations.

One important feature of international organisations and associations is that they provide a forum which facilitates comparison of producer and company arrangements in different countries, thereby speeding up the process of change in various aspects of their relationship with the companies.



In this process for example, the sixty to eighty year agreements of the old concessions gave way to periods of around twenty five years, for newly acquired licences.<sup>513</sup> It became universal for companies to be obliged to surrender up to 80% of the original concession area,<sup>514</sup> within a fairly short time limit. Arbitration provisions became restricted to local courts, various forms of state participation were introduced, and there was a general policy of taxation and fiscal provisions.

At the global level it has become state practice to enter into multilateral agreements under which countries accept restrictions on their sovereignty over certain natural resources in return for the possibility of realising common ends or of securing common benefit. Undoubtedly such an idea was also behind the formation of the European Coal and Steel Community (ECSC),<sup>515</sup> The European Economic Community (EEC)<sup>516</sup> and the European Atomic Energy Community (Euratom).<sup>517</sup> The general aim of these three bodies is to contribute to economic harmony, expansion and development to

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513. See Chapter Three III (1) of this Thesis.

514. See Chapter IV 1(c) of this Thesis.

515. United Nations Treaty Series Vol. 261, No. 3729, p. 140.

516. Ibid, Vol. 298, No. 4300, p. 11.

517. Ibid, Vol. 298, No. 4301, p. 167.

increase stability and improve standards of living in their member countries. This is to be achieved in the case of the EEC<sup>518</sup> and ECSC<sup>519</sup> by the creation of a common market. In the case of Euratom the purpose is to create conditions necessary for the speedy establishment and growth of nuclear industries;<sup>520</sup> including the creation of a common market. It may not be wrong to say that it is the European type or structure of development that Africans and other developing countries are emulating. On this premise, one may also be justified in saying that the alliance of African countries with other weak producing countries to form an organisation aimed at improving their economic backwardness is within the law.

The new and detailed knowledge acquired by the African states, both non members and members of international organisations concerning the various aspects of the petroleum, copper and other industries, not only made them well informed and harder bargainers, but it also made them extremely careful not to kill the goose that lays the golden eggs. Their understanding of the complexities of the market and the unique

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518. Treaty of Luxembourg, 27th Oct. 1956, amended by Treaty of Rome, 25th March, 1957, Art.2.

519. Treaty of Rome, 25th March, 1957, came into force 1st January, 1958, Art. 2.

520. Treaty of Rome of 25th March, 1957, Art.1.

needs and requirements of the natural resources industry is reflected in the reasonableness of their demands and the extent to which they are ready to put pressure on the companies to implement such demands. In fact nothing could be more conducive to the attainment of economic sovereignty by weak developing countries than the above strategy.



### CONCLUSION

Natural resources, especially minerals play a major part in economic well-being of a nation. The consciousness of the above fact necessitated African nations stringent control over mineral resources, before the advent of Europeans in the continent. Although the right to effective control was lost to the Powers under whose sovereignty African nations fell, the right to sovereignty over natural resources was revived on the attainment of independence.

As the concept of economic sovereignty developed in the United Nations, African states, in collaboration with other developing countries, initiated the reconsideration of the orthodox views on the issue of nationalization or state take-over of private property, the purpose for state take-over, forms of payment of compensation in the event of state take-over, and the inevitable conflicts of the principle of acquired rights and the right of states to utilize their resources.

In order to achieve economic sovereignty, the African states have formulated mineral policies, repealed colonial laws and introduced new legislation. In pursuit of national objectives, they have modified the terms of old contracts to suit the new requirements, established standards whereby both the public and private sector whether domestically or foreign-owned are expected to operate.

While adhering to the minimum standard of international economic law in the form of protection of foreign investment and peaceful settlement of disputes, African states impose the following obligations on the licensees: the incorporation of foreign firms in the host country, employment and training of local personnel, partial relinquishment of the concession area, conservation of mineral resources, implementation of safety measures, and prevention of environmental pollution. Apart from that the African states have engaged in direct exploitation of mineral resources through state-owned corporations, and also in joint venture with foreign companies.

Equally significant is the financial control by which African states regulate foreign investment, tax on profits of foreign companies, payment of rents, premiums, and royalty. African countries ask for reinvestment of profits in the host countries and at the same time allow repatriation of profit on capital to the country of original capital investment, and some economic privileges are available to foreign investors in the mineral industry.

On the international level, African states have formed associations for economic co-operation for better utilisation of their mineral resources, particularly in the form of regulation of production, formulation of common policy on

price, and exchange of information through various study groups.

Finally it is concluded that the exercise of sovereignty over mineral resources, like other spheres of state activities (exercise of political sovereignty) involves diversities of state controls in the form of legislation, organisation of mineral industry, and international co-operation at all levels.



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of self-determination
- U.N. ECOSOC 14th Sess. Supp. No. 4, E/2256 - 1952 -  
Report of 8th Sess. of Commission on Human  
Rights
- U.N. ECOSOC Off. Rec. m.7 36/E/25/73, 1954 -  
Report of 10th Commission on Human Rights
- U.N. Security Council S/4835, 31st July, 1963 -  
Reaffirmation of self-determination
- UNCTAD Doc. E/Con/46/141, Vol. 1 - General Principle III, 1964
- UNCTAD Doc. TD/B/85 Rev.1, paragraph 5

### Other International Organisations

- Organisation of African Unity (O.A.U.) Art. XIX, 1964  
Conseil Intergouvernemental des Pays Exportateurs de Cuivre  
C.I.P.E.C.  
C.I.P.E.C. Doc. CM/Lus/3/74 Vth Conference of Ministers  
Lusaka, 1974  
Ibid. Doc. CM/73/74 Fin. An Agreement to establish CIPEC.  
Ibid. INFO/53 - Agreement on Nationalisation of Copper  
Industry in Chile, 12/8/69  
Ibid. LEG/14 - General Law of Peruvian Industry  
Ibid. INFO/82 - Agreement on Terms whereby Zambian Govt.  
takes control of its Copper industry 1/12/69  
Ibid. INFO/89 - XI Convention of Mining Engineers in Peru  
Ibid. LEG/15 - Evaluation of the Mining Legislation in the  
Democratic Republic of Congo (Zaire)  
Ibid. LEG/16 - Fiscal policy in the Republic of Zaire 23/11/71  
Ibid. INFO/157 - Role of underdeveloped countries in determining  
prices of non ferrous metals 5/9/72

Organisation of Petroleum Exporting Countries OPEC

OPEC Resolution 1.1 - objective of the Organisation

OPEC Res. XVI-90 - Guidelines for Petroleum policy in member countries

Ibid. X.6.3, 15th Dec. 1965 - joint production programme

Ibid XI.72 25-28 April, 1966 on posted price

Ibid XVI-70 C1.1, 1968

International Tungsten Study Group

U.N. TD/BCI/Tungsten/3, 1st August 1975 - members of the study group

TD/B1/143 Report on Committee on Tungsten 29th October, 1973

TD/B/C.1 Tungsten 5, paragraph 9

TD/B/C.1 Tungsten Comm/WG P.3, 25 June 1974

Mining Legislation in AfricaAlgeria

Petroleum operations in Algeria are regulated by a complete body of legislation consisting of Ordinances, Decrees, Orders, Model Concessions and Administrative Instructions of primary importance:

Ordinance No. 71-22 of 12th April, 1971, which specifies the conditions under which foreign companies exercise their activities in the exploration and exploitation of liquid hydrocarbons.

Decree No. 61-1045 of Sept. 16th 1961 as amended by Decree No. 71-100, 12th April, 1971, establishing the model convention for concessions of liquid gaseous hydrocarbon deposits.

Botswana

Mines and Mineral Act No. 50, 1967.

However oil, water clay and stone are not covered by this act. If the materials are required by agricultural purposes. For Precious Stone Act, 1969

Cameroun

Law 64 LF.3 of april 1964, established the Mining Code for the Federation. See Decree No. 64 DF.163 which applies to strategic raw materials, other than hydrocarbons, but without prejudice to the individual. Conditions provided in each mining right granted by the convention Hydrocarbons are governed by 64 DF. of 16th May, 1964.



Central African Republic (AAR Law)

Law 61208 of 1961, the legislative provision governing petroleum is similar to those of the Sahara Petroleum Code and reference is also made to the Petroleum Summary of Algeria in this volume.

Chad

At the time of this research, the mining operations in Chad are governed by the base law for French Overseas Territories as contained in Decree 54-1110 of 13th Nov. 1954. Petroleum is governed by 7-P.C.Tp.MH. of 3rd February 1962. The petroleum provision is identical to that of Algeria.

Congo Brazzaville

Both mining and petroleum are regulated by the law 29-62 of June 16th, 1962, as amended by law 35-65 of 12th August, 1965 and the regulation promulgated thereunder Decree 62-247 of 11th August 1962. The provision governing petroleum is similar to those of Saharan Code. Oil, gas, uranium, thorium, lithium, helium and beryllium are classified as strategic materials and are subject to specific legislation. The investment code law 39-61 of June, 1961, is closely parallel to that of Gabon, Chad, Central African Republic

Dahomey

At the present the Republic of Dahomey like Chad, rely more on French Colonial Decree No. 54-110 of 13th November 1954 as modified by 55-658 of May 20th, 1955-57, 42 of 24th February 1957, and 57-857 of July 30th, 1957.

Ethiopia

Mining proclamation No. 282 of 1971, and Mining Regulation issued in pursuance thereto.

Gabon

Law 15/62 of June 2nd, 1962 is the principal mining code. Provision of the code may be modified by the Establishment Law 55/61. The Labour Code is also applicable to mineral operations.

Gambia

The controlling Mining legislation is Mineral Act of 1954 as amended, Chap. 121 of the revised Law 1965. Petroleum operations are regulated by the Mineral Act of 1955 as amended and Mineral Oil Regulation of 1960 (as amended) Chap 122 of the Laws 1965. Law No. 2 1965 extended Gambian jurisdiction to the continental shelf which was not specifically defined in the legislation. The territorial sea of Gambia was extended to 50 nautical miles in 1971.

Ghana

The Mineral Act No. 2 126 of 1962 and supplemental regulations issued thereunder, govern all mining and petroleum operations in Ghana. See for example Mineral Rights Regulation Ordinance Cap. 153; Mineral Regulations 1962; (L1.231) Mineral Regulation 1963 (L1.253); Mineral Amendment Regulation 1962 (L1.284); Mineral Offshore Regulation 1963 (L1.257); Mineral (Oil, Gas) Regulation 1963 (L1.258); Oil Mining Regulation 1957 (LN.221/57); Mineral Oil Taxation Ordinance (L.No. 17/1956).



Guinea

Petroleum Law Decree 54-1110

Ivory Coast

The basic legislation governing the development of Mineral Resources is the Mining Code of July 3rd 1964 Law 64-249. The Ivory Coast has not enacted a separate Petroleum Code; however the Mining Code authorizes the development of hydrocarbons under special decree. Supplement legislation relevant to the application of Law No. 64-249 to petroleum operations includes Decree 65-96 of 26th March 1965 and Arrêt 806 of 26th April 1965. Offshore legislation in the Ivory Coast claims a territorial sea of 6 nautical miles under Decree 67-334 of 1967. This decree also established the Republic's jurisdiction to the subsoil of the ocean floor lying between the low water link.

Kenya

The controlling mineral legislation in Kenya is Mining Act Chap. 306 Laws of Kenya 1962 as amended by Legal Notices 142/1963 and 56/1965 and by Act No. 21 of 1966 and by Mining Regulation and Mining Safety Regulation made under the Act. Additional relevant legislation contain in the Trading in Unwrought Precious Metals Act of 1962 Chap. 309; the Diamond Industry Production Act 1962 (Chap. 310) and



Gold Mines Development Loans Act 1962 as amended. The controlling petroleum legislation is the Mineral Oil Act Chap 307 of the Laws of Kenya 1962 as amended by Act No. 21 of 1966. Supplementary Petroleum Legislation is contained in Oil Production Act, Chap 308 of the Laws of Kenya as amended in 1962. An important piece of legislation from the point of view of potential investors is the Kenya Foreign Investment Protection Act 1964, which guarantees the assets of foreign investors in Kenya.

#### Lesotho

Mining Right Act 1967 and Mining Rights Amendment Act 1968, The Mining Act is also the controlling legislation with respect to liquid and gaseous hydrocarbons. The Precious Stone Act No. 24, 1970, regulated the precious stone trade and provided for Diamond protection and security areas. See also Lesotho Natural Development Corporation Act 1957 Lesotho Development (State Mining) Act 1968 G.N. 73 of 1968 G.N. 11 of 1968.

#### Liberia

Title 24 Chap. VI of the Liberia Code of 1956 is the basic Mining Law of the Republic. Section 179 of the Liberia Code of Law, as amended and supplemented by Diamond Industry Operation Circulars 1-1960 of April 1st and No. 16 of 1960 deal with the regulation governing mining claims and settlement of disputes between prospectors respectively. Hydrocarbons are regulated by the Petroleum Act of April 18th 1969.

Special provision for Diamonds section 179 of the Laws of Mines dealing with Diamonds has been supplemented and amended by the Act of March 20, 1958 to restore the Diamond industry.

#### Libya

Mining operations in Libya are regulated by the Mineral Law 1953. Petroleum Law No. 25 as amended by Law No. 17 of 1970, Law No. 30 of 1971, Law No. 32 of 1971, and various Royal Decrees and Supplementary Regulations.

#### Malagasy

The Mining Code of 1962 (Ordinance No. 62-103) and Petroleum Code of 1962 (Ordinance No. 62-105) regulate mining and petroleum operations in the Republic. These Ordinances are supplemented by Law of July 4, 1963, which clarifies mineral substances. These laws contain provisions similar to those of French Decree, French Overseas Territories. The Investment Code of 1962 (Ordinance No. 62-024) offers special tax and other concessions to the mineral industry.

#### Malawi

Mining operations in Malawi are regulated (by Ordinance) by the Mining Act of 1968 (Chapt. 61-01 of the Laws) as amended by the Mining (Amendment) Act No. 22 of 1971 and Mining Legislation G.N. 38 of 1937, 209 of 1952, 192 of 1953, 73 of 1964, and 131 of 1967. Exploration and production of oil is regulated by the new Mining (Amendment) Act No. 22 of 1971. Radio-active Minerals Act 1947 (Chap. 62-0L) as revised in 1968.



Mali

Mining operations in Mali are regulated by Ordinance No. 34 (CMLN of Sept. 30, 1970, the Mining Code of Mali. Petroleum operations are regulated by Ordinance No. 30/CMCN of 3rd May 1969, the Petroleum Code of the Republic as amended by Ordinance No. 21/CMN of April, 1970.

Mauritania

The basic mineral legislation, Law No. 59-060 of July 1959 provides for long term investment programmes for Iron ore concessionaires in Mauritania. This legislation is supplemented by Laws No. 59-661 of July 1959, No. 60-006 of 13th January 1960, No. 60-005 of 9th January 1960, and No. 60-121 of 13th July 1960. The basic petroleum legislation in Mauritania is Law 61-106 of 12th June 1961, which provides for long term investment programmes for exploration and development of hydrocarbons. This statute is supplemented by Law No. 61-108, 61-110 and 61-111 of June 1961. All mining and petroleum is also subject to Investment legislation. Most recent version was approved in January 1971.

Morocco

Decree of 16th April 1951 as amended by Joint Decree No. 781-69 of 31st December 1969. Previous one regarding petroleum was superceded by Dhair 1-58-227 of July 21st 1958, which now governs all petroleum activities. Other laws of importance to foreign investors in Morocco include the December 31st, 1969, especially to encourage foreign investors in Morocco as amended by Royal Decree No. 270-47 of 13th December 1969.



Niger

Mining Regulation is regulated by Law 61-8 of 29th May 1961 as supplemented by the Decree of January 1970 governing the exploitation of quarries. Petroleum Code Law 61-4 of May 9th, 1962, which is similar in many respects to Saharan Petroleum Code of Algeria. The Investment Code Law 68-24 of July 31, 1968 provides special investment provisions applicable to mineral industries; Law 63-6, 1st February, 1963, dealt with separation of foreign capital investment.

Nigeria

Mining operations in Nigeria are regulated by Mineral Ordinance of 1946 (as amended) the Quarries (Decree of 1969 No. 26, and Mines and Quarries Control of Buildings) Decree of 1969, Petroleum Operations are regulated by Decree No. 51 of 1969, Petroleum Drilling and Production Regulation of 1969. Important tax regulation - Industrial Development Act of 1958 and Petroleum Profit Tax of 1959 as amended in 1967, Nigeria mineral jurisdiction is defined in the Mineral Oil Amendment Ordinance, 1969.

Rwanda

Mining in Rwanda is regulated by the Law of January 30 1967, and the mining regulation contained in Presidential Order 55-10, 2nd March, 1967.

Senegal

Basic mining law is Decree No. 61-357 (Mining Code) of September 21st 1961. Petroleum operations are regulated by Ordinance 64-261, Petroleum Regulation of March 24th 1964, Decree No. 64-363 - Model Concession Agreement of May 1964.

Sierra Leone

The legislation governing petroleum operations consists of the Mining (mineral Oil) Act 1958, Chap 197 as supplemented by Mining Mineral Act 1960 and the Mineral Oil Amendment Regulation of 1970; Diamond Agreement and Licence (Ratification) Act, Cap. 207; Diamond Industry Profit Tax Cap. 200 Concession Act, Cap. 121; Tonkolili Supplement Agreement Cap. 204; Protectorate Mining Benefits Trust Fund, Cap. 201; Mineral (Prospecting for Diamonds Prohibition Order in Council)

Minerals (Enclosed areas) Rules;

Mineral (Rivers Sewa, Moa Closed Areas) Order in Council;

Mineral (Application of Section 60-67) Order in Council;

Mineral (Closed Area) Carbonaceous Mineral Order in Council;

Alluvial Diamond Mining Act, Cap. 198;

Alluvial Diamond Mining Rules, 1956;

Alluvial Diamond (Prospecting) Rules, 1957;

Diamond Industry Protection Act, Cap. 199;

Machinery (Safe Working and Inspection) Act, Cap. 218;

Machinery Woodworking Safety Rules, 1957;

Machinery (Safe Working and Inspection) Fees for Boiler Testing Rules, 1957;

Explosives Act Rule, 1959;

Explosive Act, Cap. 235;

Chap 196 (Mineral Act Arrangement of Sections)

#### Sudan

Mining and Exploration Laws in the Sudan, Bulletin No. 25 1974.

#### Somalia

Law No. 77 of 22nd November 1970, Annex A;

Decree of the President of the Supreme Revolutionary Council of 3rd April, 1971, Law No. 1 of 21st October, 1969.

#### Swaziland

The basic mining legislation consists of Swaziland Proclamation of 1958 and the Law No. 8 1969.

#### Tanzania (Tanganyika)

Cap. 123, Supp. 58; Chap. 123 of Law revised, the principal legislation, Government Notice No. 395 published on 3rd July 1964 - Mining Amendment Regulation - Made under Section 100. Mining Order under Section 9(1).

#### Uganda

Mining Activities in Uganda are Regulated by the Act Chap. 248 Revised edition 1964 as amended. The Act covers all minerals in Uganda.



Upper Volta

Mining is regulated by the Code of 26th June 1965, Petroleum Act continues to be governed by the Decree 54-1110 of Nov. 13, 1954, which govern French Overseas Territories.

Zaire

La Legislation Miniere Nationale Congolaise Tome 1-101  
Miniere Nationale - Ordinance Loi No. 67-231 du 11 Mai 1967.  
Portant Legislation generale sur les Mines et Hydrocarbures.  
Tome II Le Reglement Miniere Ordinance No. 67-416 du 23rd  
Septembre, 1967.

Zambia

The Mines and Miner Act No. 46 of 1969 in force 1st  
Jan. 1970. The Mines and Mineral Act 1969; Mineral Tax  
Act, 1970.

(See also Economic Report No. 26, 1970).